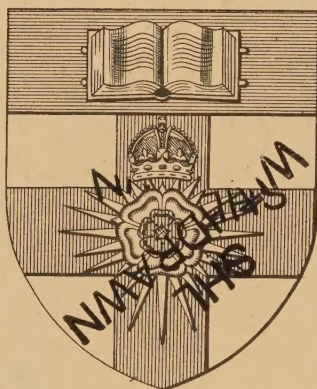


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INTERNATIONAL LAW

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THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE:¹ TREATY INTERPRETATION AND CERTAIN OTHER TREATY POINTS²

By G. G. FITZMAURICE, C.M.G.

Second Legal Adviser to the Foreign Office

DIVISION A: TREATY INTERPRETATION

§ 1. PREFATORY REMARKS³

(a) *Current controversies on the theory of treaty interpretation.* The pronouncements of the Court on treaty interpretation must be viewed against the background of certain current controversies. There are today⁴ three main schools of thought on the subject, which could conveniently be called the 'intentions of the parties' or 'founding fathers' school; the 'textual' or 'ordinary meaning of the words' school; and the 'teleological' or 'aims and objects' school. The ideas of these three schools are not necessarily exclusive of one another, and theories of treaty interpretation can be constructed (and are indeed normally held) compounded of all three. However, each tends to confer the primacy on one particular aspect of treaty interpretation, if not to the exclusion, certainly to the subordination of the others. Each, in any case, employs a different approach. For the 'intentions' school, the prime, indeed the only legitimate, object is to ascertain and give effect to the intentions, or presumed intentions, of the parties: the approach is therefore to discover what these were, or must be taken to have been. For the 'meaning of the text' school, the prime object is to establish what the text means according to the ordinary or apparent

¹ The First Part of this study appeared in this *Year Book*, 27 (1950), under the heading 'General Principles and Substantive Law'. It is hoped that the Third Part, dealing with the law relating to the United Nations and other international organizations, and with the competence and procedure of the Court itself, will appear in the *Year Book* for 1952.

² For reasons of a practical character, only the decisions and opinions of the Court given prior to 31 March 1951 are dealt with here. The Advisory Opinion on Reservations to the Genocide Convention is therefore not covered. It is hoped to examine this and later decisions and opinions in a second cycle of articles.

³ In framing these prefatory remarks, the writer has made constant use of recent work by Professor Lauterpacht (see his article on treaty interpretation in this *Year Book*, 26 (1949), and his reports on the subject to the Institute of International Law, Bath and Siena Sessions). However, Professor Lauterpacht incurs no responsibility for the form given to the matter here.

⁴ In one sense, these controversies are not new, and most of the theories involved have a considerable history; but they have recently acquired fresh vigour. The issues involved are vividly illustrated in the proceedings of the Institute of International Law, Bath and Siena Sessions, and more particularly in the opposing views expressed by Professor Lauterpacht, as *rapporteur* on treaty interpretation, and Sir Eric Beckett, principal Legal Adviser to the Foreign Office, as a member of the Commission on that subject. The present writer is highly indebted to both.

signification of its terms: the approach is therefore through the study and analysis of the text. For the 'aims and objects' school, it is the general purpose of the treaty itself that counts, considered to some extent as having, or as having come to have, an existence of its own, independent of the original intentions of the framers. The main object is to establish this general purpose, and construe the particular clauses in the light of it: hence it is such matters as the general tenor and atmosphere of the treaty, the circumstances in which it was made, the place it has come to have in international life, which for this school indicate the approach to interpretation. It should be added that this last, the teleological, approach has its sphere of operation almost entirely in the field of general multilateral conventions, particularly those of the social, humanitarian, and law-making type.¹ All three approaches are capable, in a given case, of producing the same result in practice; but equally (even though the differences may, on analysis, prove to be more of emphasis and methodology than principle) they are capable of leading to radically divergent results. The main practical issues round which controversy centres are the following:

(i) *Rules or no rules?* There has lately been a revolt against the over-elaboration of rules of interpretation.² This, in its more extreme form, amounts virtually to a rejection of such rules as being confusing and of little practical value in application.³ According to this view, the rules contradict or cancel each other out, or have to be applied with so many exceptions or variations that the rule itself tends to be lost sight of.⁴ It would be better therefore to rely on two or three basic general principles,

¹ It may be useful to state briefly the main drawback of each method, if employed in isolation or pushed to an extreme. In the case of the 'intentions' method, it is the element of unreality or fictitiousness frequently involved. There are so many cases in which the dispute has arisen precisely because the parties had no intentions on the point, or none that were genuinely common. To make the issue dependent on them involves either an abortive search or an artificial construction that does *not* in fact represent their intentions. The 'textual' method suffers from the subjective elements involved in the notions of 'clear' or 'ordinary' meaning, which may be differently understood and applied according to the point of view of the individual judge. There may also be cases where the parties intended a term to be understood in a specialized sense, different from its ordinary one, but failed to make this clear on the face of the text. The teleological method, finally, is always in danger of 'spilling over' into judicial legislation: it may amount, not to interpreting but, in effect, to amending an instrument in order to make it conform better with what the judge regards as its true purposes.

² Apart from the classic statement of Vattel (*Droit des Gens*, vol. i, ch. xviii), detailed formulations of rules amounting to a system are to be found in, for instance, Oppenheim (vol. i, §§ 553, 554), and in the *Georges Pinson* case (*Annual Digest of Public International Law Cases*, 1927-8, Case No. 292).

³ Led at this time by Professor Lauterpacht (see this *Year Book*, 26 (1949), pp. 49-55). See also Hyde, vol. ii (2nd ed.), pp. 1468 ff., and *Annuaire* of the Institute of International Law (1950), 1, pp. 367-460.

⁴ A good statement of this view was given by Professor Verzijl (quoted by Lauterpacht, loc. cit., p. 52) as follows: 'In principle they [the rules employed by the Permanent Court of International Justice] are all correct, but on concrete application they often abrogate each other and frequently appear worthless.' (Verzijl as arbitrator had formulated the rules in the *Georges Pinson* case (*supra*), but made this statement ten years later.)

and accept the fact that in the last resort all interpretation must consist in the exercise of common sense by the judge, applied in good faith and with intelligence. The point is also made¹—and it has force—that in so far as interpretation by the use of rules means (in effect) applying the *correct* rule, a process of selection is necessarily involved which itself presupposes that a preliminary interpretation has taken place. The opponents of this view consider that it leaves too much to the discretion of the judge, and point to the existence of rules of interpretation in most systems of law, as being necessary to ensure that decisions are given on reasoned grounds of principle, and not arbitrarily. The practical difficulties which may arise in the application of the rules are, according to their view, due not to multiplicity or contradictoriness, but to the absence of any definite system establishing the *order* in which the rules should be applied, and the relative weight to be given to each. It should be the task of courts, or of learned academic bodies such as the Institute of International Law, to establish such a system.²

(ii) *Intentions of the parties relevant or irrelevant?* The view that the intentions of the parties are relevant, and that to ascertain and give effect to them is the prime and sole legitimate object of interpretation,³ is not only the traditional but also the juridically natural view, derived from well-known principles of private contract law. It is probable that few would have thought of questioning it before the advent of the modern general multilateral convention. Formerly, treaties were mainly bilateral, or confined to a relatively small number of parties (there were of course important exceptions); and these parties were usually actuated by a genuine and well-defined common aim. The contractual and consensual element in such treaties was apparent and unquestioned. There is, however, now a school of thought which, while not necessarily questioning the continued relevance of intention in the bilateral sphere, does query whether it is anything much more than a pious fiction in the general multilateral field. The haste and confusion in which multilateral conventions are often drawn up; the mixed aims, motives, interests, and ideologies of the countries represented at the drafting conference; the fact that many of those States which took a

¹ See Lauterpacht, loc. cit., p. 53, and Salvioli in *Annuaire* of the Institute of International Law (1950), I, p. 454.

² For an admirably stated exposition of this view by one of its leading protagonists see the observations of Sir Eric Beckett in *Annuaire* of the Institute of International Law, (1950) I, pp. 435-40.

³ For a trenchant statement of this view see Lauterpacht, loc. cit., p. 83: 'It is the intention of the authors . . . which is the starting-point and the goal of all interpretation. It is the duty of the judge to resort to all available means . . . to discover the intention of the parties. . . . Words have absolutely no meaning in themselves. They are an expression of will.' See also *per* Anzilotti in his Dissenting Opinion in the *Night Work* case before the Permanent Court of International Justice (Series A/B, No. 50, p. 383): 'the words have no value except as an expression of the intention of the parties'.

share in the framing of the convention subsequently fail to become parties to it, while on the other hand many States which took no share in the framing do become parties by subsequent accession; the fact that States may accede to these conventions many years after they were originally drawn up, when the exact intentions of the framers, even if ascertainable at all, have become overlaid by a long process of practice and application, and that a position may well be reached in which the majority of the actual parties to a convention are States which did thus accede, and had no hand in the original drafting—all these and other considerations, it is suggested, render the very notion of the intentions of the parties artificial, and the task of ascertaining and giving effect to them wellnigh impossible.¹

The extreme teleologists belong to this school, and their solution is to 'bypass' the idea of intention, and construe the text in the light of the known or presumed objects of the treaty, as declared in it or to be inferred from the circumstances of its making, and from its subsequent history and operation. A more moderate view, while not overtly rejecting intention as wholly irrelevant, considers that a firmer foundation for interpretation, in the conditions above described, is to keep so far as possible within the four corners of the treaty, giving the text its ordinary or apparent meaning in the context, so long as this makes sense both in itself and in relation to the treaty as a whole, and resorting to extraneous aids only in case of difficulty, ambiguity, or obscurity.² On this view, the primary question is not 'what did the parties intend by this clause?' but 'what does this clause mean in itself?' Viewed from a slightly different standpoint, the real essence of the controversy lies not in the question whether the intentions of the parties shall prevail, but in the question *where* those intentions are to be found, or alternatively, where they are (primarily) to be looked for.

It should be added, in order to avoid misunderstanding, that it is fully acknowledged by the 'intentions' school that there may be cases where it is not merely a matter of artificiality—or unreality, or difficulty of ascertainment—but of the actual non-existence of any intention. Professor Lauterpacht, for instance, discusses five such types of case.³ Where this is the position, it is evident that the judge must either ascribe to the parties the intention he thinks they would have had, if they had one, or find some other criterion for interpreting the text.⁴ The real difference between

¹ There are many problems: for instance the very phrase 'intentions of the parties' is ambiguous. What parties and what States rank for the purpose? What is the position in this respect of a State which took a leading part in the drafting but did not subsequently become a party? Is what it intended at the conference still material?

² In effect the 'golden rule' quoted by Lauterpacht, loc. cit., p. 53, citing *Gray v. Pearson* (10 E.R. at p. 1234).

³ This *Year Book*, 26 (1949), pp. 75, 82.

⁴ For instance, what Professor Lauterpacht (loc. cit., p. 81) calls 'the overriding—the higher—common intention of the parties, not less real because it is necessarily implied'. He also says

the 'intentions' and the other school on this point is that the latter, in effect, maintains that the absence of any certain intention on the part of the parties in cases of disputed points of interpretation is not in any way the exception, but rather, or almost, the rule: therefore, it is useless to adopt as the main criterion and aim of interpretation something which in practice will usually be found to be lacking. Alternatively, on this view, an obscurity in the text is usually (though not invariably—see p. 17, *infra*) itself the reflection of an obscurity or deficiency in the intentions of the parties, the attempt to ascertain which will not therefore produce any useful result.¹

(iii) *Recourse or non-recourse to travaux préparatoires*. This is an important offshoot of the previous issue. There is probably no school of thought which rejects recourse to *travaux préparatoires* in all circumstances, though some question whether it ever has much utility except to confirm or reinforce an interpretation already fairly clear on the face of the text itself. The real issue lies between those who consider that such recourse should be *quasi-habitual* (even where the text is apparently clear), and those who consider it should only be resorted to in case of patent ambiguity or obscurity, and then only if other means of resolving the difficulty have failed.

The first school maintains, in effect, that no disputed text is ever completely clear, or it would not be in dispute; that, in any case, even an apparently clear text is seldom so clear that reference to the records will not serve to make it clearer still, or, by confirming the meaning to be deduced from the text itself, add weight and force to the interpretation arrived at; finally, that the very notion of clarity is a subjective one. The same points are made *mutatis mutandis* about the terms 'plain meaning' and 'ordinary meaning'. The underlying feeling is that just as the selection of the correct rule of interpretation involves a previous process of interpretation, so, equally, the conclusion that the meaning of a text is clear, and therefore that no recourse to the records is called for, involves itself a process of interpretation, the result of which might have been different if the records had in fact been consulted.

The opponents of this view maintain that reference to *travaux préparatoires*, unless *ex necessitate*, is to be deprecated, because (apart from its cumbrousness) the circumstances attendant on the holding of international

(p. 80): 'In these or similar cases the common intention in relation to the particular case must be derived from the common intention of the treaty as a whole—from its policy, its object, and its spirit.' Again (p. 78) he states the duty of the judge in this type of case to be 'to impart an effect to these clauses by reference to the purpose of the treaty as a whole and to other relevant considerations'. While it is true that these remarks of Professor Lauterpacht expressly refer to cases of the admitted absence of any intention, it is in fact a paradox of the whole subject that the 'intentions' view of interpretation has (as witness these remarks of Professor Lauterpacht's) a constant tendency to pass over into teleology, although the true teleologists themselves reject the criterion of intentions as such (see below, § 4 (A) (c)).

¹ See also § 4 (A) (d) *infra*.

conferences and the framing of general conventions¹ at best make it of doubtful utility, and in many cases confusing or even actively misleading.²

In practice, the opposition between these points of view (apparently absolute) is mainly one of emphasis. Given that in some cases recourse to the records is clearly superfluous, but in others not, where is the line to be drawn? Even in the framing of this question the two schools would put the emphasis in a different place. For the one, it would be: what is the degree of (irresistible) clarity requisite in a text in order to render reference to preparatory work plainly redundant;³ for the other it would rather be: what degree of ambiguity or obscurity must exist before such reference becomes indispensable.

(b) *Summary statement of the Court's general position on these issues.*

(i) *Rules or no rules.* The Court has made no pronouncement on the desirability or otherwise of having definite rules of interpretation. But it is inevitable that such an institution, called upon to interpret various texts and instruments, should in fact develop a jurisprudence on the subject, reducible to a set of coherent propositions or principles. It is the object of the following pages to try to formulate these.

(ii) *Relevance of intention.* The Court has not formally adopted any position on this issue, still less declared intention to be irrelevant to interpretation (though certain individual Judges, giving separate or dissenting opinions, have virtually done so). On the other hand, the general approach of the Court to the task of interpretation, and its attitude on such matters as recourse to *travaux préparatoires*, has been *in effect* to give secondary rank to the element of intention.

(iii) *Travaux préparatoires.* The Court has shown no eagerness to have recourse to *travaux préparatoires*, and has not in fact done so, except on one occasion where the issue was not strictly one of interpretation.⁴ It has expressed itself as generally unwilling to resort to preparatory work where

¹ Again, it is with regard to general multilateral conventions that the issue mainly arises in practice.

² The reasons for this view are more fully developed later—see § 4 (A) (d) *infra*.

³ This is how Professor Lauterpacht has recently suggested to the Institute of International Law (Siena Session, 1952) that the issue should be expressed.

⁴ In its Advisory Opinion on Reservations to the Genocide Convention (*I.C.J.*, 1951, 15), the Court based its view in part on certain statements made by representatives of Governments during the drafting of the Convention. But in so doing, the Court was not interpreting any provision of the Convention itself (nor did the Request addressed to it put any point of interpretation as such). The particular issue involved in the appeal to the records was whether, despite the absence of any express clause in the Convention permitting reservations to be made, there had been a tacit understanding among the delegates drawing up the Convention that certain kinds of unilateral reservations would be permitted. The point was therefore extraneous to the text of the Convention, and the question of intention was a *substantive* issue, *per se*, rather than something to be ascertained as a *means* to interpreting something else.

the meaning of the text seems clear and leads to no absurdity in the context.¹

The jurisprudence of the Court must now be considered in greater detail.

§ 2. THE COURT'S BASIC ATTITUDE TO INTERPRETATION

(a) *Two major doctrines.* The philosophy of the Court on the subject of treaty interpretation has exhibited a dichotomy² of view between the Court as a whole and some of the individual Judges. Nevertheless it has been common to both points of view to avoid recourse to *travaux préparatoires*, and relegate to a secondary place any direct inquiry into the intentions of the parties as being *per se* the object of interpretation. The Court as a whole favours (on its pronouncements up to date) the textual method, while some of the individual Judges are teleologists.

(i) *Doctrine of textual interpretation.* The thought of the majority could be summed up by saying that in their view the intentions of the framers of a treaty, as they emerged from the discussions or negotiations preceding its conclusion, must be presumed to have been expressed in the treaty itself, and are therefore to be sought primarily in the actual text, and not in any extraneous source.³ Furthermore, treaties must be interpreted as they stand, and subject to the limitations inherent in the fact that they only contain so many articles, phrases, and words. The intentions or presumed intentions of the framers cannot be invoked to fill in gaps, or import into the treaty something which is not there, or to correct or alter words or phrases the meaning of which is apparently plain, or to give them a sense different from that which they possess according to their normal and natural meaning. In short, the attitude of the Court to a text is not, primarily, to ask itself what was this text *intended* to mean (still less of course what *ought* it to mean, or to be made to mean), but what does it in fact mean on its actual wording?⁴

(ii) *Teleological method.* Certain of the individual Judges, while agreeing with the Court that the intentions of the framers are to be looked for

¹ The principle involved is identical with that followed by the Court's predecessor, the Permanent Court of International Justice. However, the Permanent Court in practice had fairly frequent recourse to *travaux préparatoires*, from which there may be inferred a greater readiness on its part to regard a text as not so clear as to render this superfluous.

² This term is employed here in its strict technical sense of a bifurcation. Up to a point the views of the Judges have been on similar lines.

³ It is worth stressing that, except in its extreme form, the doctrine of textual interpretation does not deny the relevance, as such, of the intentions of the parties, but thinks that since the parties, after perhaps several weeks or months of negotiation, drew up a text which was supposed to embody those intentions as eventually *arrived at*, it is proper to look to that text as being the final expression of the parties' view, rather than at what was said during the negotiations.

⁴ It must be recognized that the attitude of any Court on a question like this is necessarily conditioned to some extent by the type of case it has actually had to deal with, and it may well be that the problems of interpretation the Court has so far had before it have somewhat lent themselves to treatment by this method.

primarily in the treaty itself, go much farther and adopt an avowedly teleological basis of interpretation.¹ According to the teleological principle, a treaty must be interpreted—and not only interpreted, but as it were assisted or supplemented—by reference to its objects, principles, and purposes, as declared, known, or to be presumed. In this way, gaps can be filled, corrections made, texts expanded or supplemented, always so long as this is consistent with, or in furtherance of, the objects, principles, and purposes in question.² It is evident that this method, taken beyond a certain point, would involve tribunals in legislative instead of judicial or interpretative functions, and it is for this reason that the majority of the Court has declined to follow it. The Court would no doubt agree that the objects, purposes, and principles of a treaty, as stated in it, or as clearly evidenced otherwise, are material for *interpretative* purposes: in order, for example, to clear up an ambiguity in a particular article, to enable full value and effect to be given to the various provisions, or to reconcile one part of the text with another and enable the treaty to be interpreted as a whole. But the Court rejects the use of this method for purposes going beyond interpretation; for example, altering the apparent sense of a phrase, supplementing texts by reading into them something that is not there, &c.

(b) *Reconciliation of these doctrines.* The differences of view involved may be less wide than they appear, and in practice need not even be as wide as they are. The teleological principle, expressed in a more restrained form, is really an application of the well-known and valuable rule of treaty interpretation which the Court itself has recognized—the rule *ut res magis valeat quam pereat*, or principle of maximum effectiveness—the rule that, other things being equal, so to speak, texts are to be presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it, and so as to have the *fullest* value and effect consistent with their wording (so long as the meaning be not strained) and with the other parts of the text. Regarded in this way, the teleological principle has a useful role to play without going beyond the bounds of legitimate interpretation, or involving the Court in an essentially legislative activity, which would be inadmissible. The Court, as will be seen, has in fact adopted the principle of effectiveness, subject to limitations which ensure that the language of the instrument is not strained and the interpretative function not exceeded.

¹ This attitude tends to be taken up principally with reference to the interpretation of the constitutions of international organizations such as the United Nations, where there may well be a special case for the use of what might be called creative or dynamic methods of interpretation.

² Moreover, the *operation* of the treaty may have revealed new objects or vistas, so that (on this view) the intentions of the original framers must be superseded or overridden in order to give effect to the 'true' purpose. This, the present writer suggests, might be called the theory of 'emergent' purpose.

§ 3. CHIEF PRINCIPLES OF INTERPRETATION APPLIED BY THE COURT. SUMMARY FORMULATION

Taking the various cases as a whole, and the pronouncements of the Court having a general character, it seems possible to formulate the following self-consistent¹ body of principles as constituting the main general rules of interpretation laid down by the Court, and as representing its essential doctrine on the subject:

(A) *Major principles of interpretation*

I. *Principle of Actuality.* Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. *Principle of the Natural Meaning.* Particular words and phrases are to be given their normal, natural, and unstrained meaning, in the context in which they occur.

Subject to I and II:

III. *Principle of Integration.* Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles.

IV. *Principle of Effectiveness.* Particular provisions are to be interpreted so as to give them the fullest weight and effect consistent with the normal meaning of the words and with other parts of the text.

V. *Principle of Subsequent Practice.* In interpreting a text, recourse to the subsequent practice of the parties, as evidenced in rules of procedure they have formulated, or in other ways, is not only permissible but desirable; in brief, the way in which the treaty has actually been interpreted in practice is evidence (sometimes the best evidence) of what its correct interpretation is.²

(B) *Subsidiary interpretative findings*

The following subsidiary findings of the Court may also be noticed, deriving either from the above main principles or from the fundamental attitude of the Court towards the whole subject of treaty interpretation:

1. Positive and active obligations—as also definite exceptions to, or derogations from, such obligations—cannot be left to arise as a mere inference from a text or provision. They must be expressed in terms. In other words, positive obligations, or exceptions thereto, cannot be *read into* a treaty. If not actually expressed, they must at least be a *necessary* (and not merely a *possible*) inference from what *is* expressed.

2. A Court cannot remedy a breach of treaty, by reading into the treaty a sanction or remedy for which it does not provide. This does not affect the responsibility of the defaulting State, but the remedy will consist in the application of the ordinary rules of State responsibility, liability to pay damages or compensation, &c. The Court cannot interpose to apply or sanction a special remedy not expressly contemplated by the treaty, or different from the method it does contemplate.

¹ That is, if Nos. I and II are read (as they are intended to be) as prevailing over Nos. III and IV in case of conflict, and No. V is treated as an adjunct or aid, rather than a strictly independent principle *per se*. This demonstrates the possibility of giving a relative order and weight to a set of rules (see p. 3 above).

² It is probably implicit in this view that while there may often be uncertainty about the original intentions of the framers, and difficulty in ascertaining them, there is usually neither as regards the way in which the parties have subsequently *operated* the treaty.

3. Powers or functions provided in a treaty for the purpose of assisting the parties *mutually* cannot be applied or utilized for the benefit of one or some of them only, and against the other or others, even if it is the default of the latter that has led to these powers or functions being invoked.

4. The preamble to a treaty (which does not and should not have direct operative force) has effect as indicating the general purposes and spirit of the treaty, in the light of which the interpretation to be given to particular provisions may be considered.

5. *Expressio unius est exclusio alterius*.

The above statement represents a bare summary of the principles of interpretation applied by the Court: it is now necessary to consider the Court's own formulation of them.

§ 4. THE COURT'S FORMULATION OF THE ABOVE PRINCIPLES AND RULES

(A) *Major principles of interpretation*

(a) *The Court's formulation of Principles I and II (Principles of Actuality and of the Natural Meaning)*. *Attitude towards travaux préparatoires and the original intentions of the framers*. These two principles constitute, up to date, the fundamental rules of interpretation adopted and applied by the Court, from which most of the others flow, and it should be possible to regard them as part of the settled jurisprudence of the Court.¹ A considered statement of them was given in the (*Second*) *Admissions* case (*I.C.J.*, 1950, 8) as follows:

'The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result [sont équivoques ou conduisent à des résultats déraisonnables²], then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean [avaient en réalité dans l'esprit] when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39):

'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'

'When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard,

¹ That is, as a matter of basic doctrine. It is always possible that modifications of application or emphasis will assert themselves as time goes on.

² The French term *déraisonnable* is somewhat stronger than the English 'unreasonable' and means something more like 'contrary to reason'.

however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*.¹

It is important, in the above passage, to notice that it is 'in the context in which they occur' that treaty provisions are to be interpreted according to their natural and ordinary meaning. It is not therefore a narrow and quasi-literal interpretation of words, phrases, or articles, taken in isolation, that is envisaged, but one related to the treaty as a whole. This is the principle of integration—see below, subsection (e). The same fundamental principles were affirmed in the (*First Admissions* case (I.C.J., 1948, 63):

'The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.'²

In the same case (*ibid.* 62) the Court, when interpreting a clause of the Charter, said that the 'natural meaning of the words used' led to a certain conclusion, which the Court adopted as correct. In the *Asylum* case equally (I.C.J., 1950, 279), the Court said that if regard were had to the structure of a certain provision and, 'on the other hand, to the natural and ordinary meaning of the words "in turn", this provision can only mean that . . . [here followed the views adopted by the Court]'.³ In the *Peace Treaties* case (2nd Phase) also, the Court said (I.C.J., 1950, 227) that while the text 'in its literal sense' did not completely exclude a certain possibility, it was 'nevertheless true that according to the natural and ordinary meaning of the terms' something else was 'intended'.⁴ Here the Court indicated in effect that the true intention was to be found in the natural meaning; and therefore in the text itself rather than in any extraneous source.⁴

¹ This was really a more striking case of refusal to look at *travaux préparatoires* than the (*Second Admissions* case, for whereas in the latter it was only by a very strained and peculiar construction of the text that any ambiguity in it could be suggested (see the Chapter on international organizations in the Third Part of this study, to be published in this *Year Book* for 1952), in the former case there were (as the four-Judge Minority Opinion showed) at least real grounds for the view that another interpretation was possible, and that the intention of the text was not wholly clear on the face of it. For this reason it may be possible (on the ground that the text was not in fact clear on the face of it) to question the refusal of the Court to look at the San Francisco records in the (*First Admissions* case. However, even if so, this would not be a criticism of the principle itself, but of its application in that particular case.

² Professor Lauterpacht has pointed out that, in another aspect, the *Asylum* case is inimical to the doctrine of textual interpretation, since it revealed the difficulties that may attach to the conception of the 'clear' meaning of a text. The Court held it to be 'inconceivable' that a certain important term should have a certain meaning. Judge Read, dissenting, however, thought it must be held to have that very meaning because, inconceivable though it might be ordinarily, the term must be interpreted in the light of certain Latin-American usages with reference to which the parties must be taken to have contracted—and 'the intention of the parties must prevail' (I.C.J., 1950, 322).

³ Here is a clear indication that by the natural and ordinary sense the Court does not intend necessarily to denote the *literal* meaning.

⁴ It is in this that the real essence of the intentions-versus-text controversy lies. Few would deny the abstract truth of Anzilotti's and Lauterpacht's *dicta* (*supra*, p. 3, n. 3) that words

(b) *Qualification to rule of non-recourse in principle to travaux préparatoires.* *Nature of travaux préparatoires.* There would seem to be general agreement (though the Court *as such* has not pronounced itself on the point) that certain documents prepared in the course of a conference, though extraneous to the text of the eventual treaty, do not rank as mere *travaux préparatoires*, but should be regarded as conference instruments.

Referring to a clause in the Report of Committee II/I of the San Francisco conference, which set out a particular interpretation of Article 4 of the Charter, and stated that the Committee 'agreed that this interpretation should be included in its minutes as the one that should be given to this provision of the Charter, and on this basis approved the text suggested by the Co-ordination Committee', the four-Judge minority in the (*First*) *Admissions* case (Judges Basdevant, Winiarski, McNair, and Read) said (*I.C.J.*, 1948, 87):

'Without wishing to embark upon a general examination and assessment of the value of resorting to *travaux préparatoires* in the interpretation of treaties, it must be admitted that if ever there is a case in which this practice is justified it is when those who negotiated the treaty have embodied in an interpretative resolution or some similar provision their precise intentions regarding the meaning attached by them to a particular article of the treaty.'

Judge Azevedo also quoted and referred with approval to this pronouncement in the (*Second*) *Admissions* case (*I.C.J.*, 1950, 30-31), in connexion with the possible bearing on the matter at issue of the well-known San Francisco Four-Power Declaration on the voting rule in the Security Council—a striking example of an interpretative instrument. The point involved is one of importance, because all those with experience of international conferences know how frequently texts are adopted (and only adopted) on the basis of a particular interpretation which it is agreed should be recorded in the minutes.¹ If such interpretations are to be regarded simply as forming part of the *travaux préparatoires*, they may never even be considered by a Court which believes that it finds the meaning of the text

have no value except as an expression of the will or intentions of the parties. Most would probably agree that the object of interpretation is that the will and intentions of the parties should prevail. The real question is: where are they to be found, or looked for? The Court's answer to this question is, in effect, that there is not much point in the parties, after perhaps prolonged negotiations, embodying their intentions in a text, formally agreed, concluded, and drawn up, unless those intentions are sought for primarily in that text, and recourse to extraneous matter is avoided unless necessitated by defects in the text. The 'intentions' school, on the other hand, may seem, on analysis, really to hold (in so far as the *practical* differences between them and the textual school lie) that the intentions of the parties are something to be established independently, in the light of which the text is then subsequently to be 'interpreted'.

¹ The position of interpretations formulated by *particular delegations*, and inserted at their request in the minutes or reports, *as embodying their view* regarding the correct interpretation of the provision, on the basis of which they are prepared to agree to it, is of course quite different. It is not possible to discuss here what is the exact effect of such statements, but in any case they could not rank as *agreed* interpretations, on the basis of which the treaty or convention had been generally adopted by the conference as a whole.

sufficiently clear on the face of it.¹ What the four-Judge minority in the (*First*) *Admissions* case must really be taken to have suggested, therefore, is that minutes, declarations, resolutions, &c., having the character of an *agreed* interpretation should be regarded, if not as part of the treaty itself, then as ancillary thereto, and as part of the complex of instruments produced by the conference in connexion with the treaty it drew up. Looked at in this way, no derogation from the rule of non-recourse to *travaux préparatoires* is involved, for the documents concerned do not rank as *travaux préparatoires* but as substantive instruments. As Judge Azevedo said (*loc. cit.*), such instruments are

‘...not an ordinary element of the *travaux préparatoires*, which can often lend themselves to contradictory use, like a double-edged weapon’.

(c) *Extreme teleological view as formulated in Separate or Dissenting Opinions.* The majority of the Court has not only based itself on main principles which do not admit of the teleological method of interpretation, as such—it has also shown itself aware of the dangers inherent in this method. In the *Peace Treaties* case (2nd Phase), for instance, the Court said that it was ‘the duty of the Court to interpret the Treaties, not to revise them’ (*I.C.J.*, 1950, 229). Certain of the Latin-American Judges have, however, in Separate or Dissenting Opinions,² given expression to the purely teleological standpoint. Thus Judge Azevedo in the (*Second*) *Admissions* case said (*I.C.J.*, 1950, 23):

‘... the interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, co-operation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims one must seek the method of interpretation most likely to serve the natural evolution of the needs of mankind.

‘Even more than in the applications of municipal law, the meaning and the scope of international texts must continually be perfected [i.e. by interpretation], even if the terms remain unchanged. . . .’

This was a frank plea for a quasi-legislative activity by tribunals and it is not surprising to find that Judge Azevedo, in common with most extreme

¹ This is, admittedly, precisely the argument used by those who favour *habitual* recourse to *travaux préparatoires*, in case they should contain anything material, either contradicting or confirming the apparent meaning of the text. But the following point must be noticed. There is a certain element of unreality in much of the discussion about recourse to *travaux préparatoires*, since in fact the parties to the dispute, in their arguments, invariably draw the attention of the Court to anything material which the records may contain. In that sense the Court always *looks* at the *travaux préparatoires*. The question is, however, not whether the Court will notice the *travaux*, but whether it will *take account* of them in arriving at its conclusions, whether in other words it will or will not base its findings in whole or in part on them. Here there is obviously a great difference between the position of *travaux préparatoires* in the strict sense of the term, and documents which are themselves part of the agreed conclusions of the conference.

² Attention was called in the introduction to the First Part of this study (this *Year Book*, 27 (1950), pp. 1–2) to the general value of separate and dissenting opinions, and the importance of not neglecting them in any estimate of the Court’s work.

teleologists, regarded¹ the intentions of the framers as having little comparative weight. Thus in the same case he added (*loc. cit.*):

'... it is well known that (according to those who are in favour of using them) the value of *travaux préparatoires* is based, for purposes of interpretation, on the *voluntas legislatoris*, to which no great importance is attached today'.

Certain implications underlying this view merit careful attention, because they give expression to a feeling constantly experienced by those who have knowledge of the work of international conferences, and of the subsequent difficulties of interpretation which may arise from the results of this work. The nature of these implications appears in the following passage from the Dissenting Opinion of Judge Alvarez in the (*Second*) *Admissions* case (*I.C.J.*, 1950, 18):

'It will be necessary in future—unless in exceptional cases—when interpreting treaties, even those which are obscure, and especially those relating to international organisations, to exclude the consideration of the *travaux préparatoires*, which was formerly usual. The value of these documents has indeed progressively diminished, for different reasons: (a) they contain opinions of all kinds; moreover, States, and even committees, have at times put forward some idea and have later abandoned it in favour of another; (b) when States decide to sign a treaty, their decision is not influenced by the *travaux préparatoires*, with which, in many cases, they are unacquainted; (c) the increasing dynamism of international life makes it essential that the texts should continue to be in harmony with the new conditions of social life.

'It is therefore necessary, when interpreting treaties—in particular, the Charter of the United Nations—to look ahead, that is, to have regard to the new conditions, and not to look back, or have recourse to *travaux préparatoires*. A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it.'²

(d) *Discussion of Judge Alvarez's views.* The matter is of sufficient importance to warrant some special discussion of it, for whereas the reasons for advocating a quasi-habitual recourse to *travaux préparatoires* are known, and indeed in a sense obvious, those in support of the contrary view are much less well understood, particularly in their bearing on the question of the relevance of the intentions of the parties. Clearly, as Judge Azevedo pointed out, the whole object of recourse to *travaux préparatoires* is to ascertain the intentions of the parties.³ Unless this object is likely to be

¹ Judge Azevedo must, alas, be referred to in the past, in view of his untimely and regretted death in April 1951.

² For reasons which have already been noticed, the Court, while holding a very similar view about actual recourse to *travaux préparatoires*, would not agree with all the implications drawn by Judge Alvarez, or, in the form in which he stated it, with the principle of interpretation which he proposed in substitution. Yet, in another and more modified form, the Court gave its authority to certain principles which have in practice an effect very similar to that of Judge Alvarez's forward-looking doctrine, namely, those of effectiveness and of recourse to the subsequent practice of the parties as a guide to what the treaty really means. These are discussed later.

³ This is perhaps the place to notice a particular aspect of this object. The point is made that

achieved, and in a form in which it will provide a reliable guide to the meaning of the text, there is little point in embarking on what will usually prove to be a difficult and exacting (and possibly unrewarding) task. Judge Alvarez in effect suggests that this object will normally *not* be achieved, and his arguments might be elaborated as follows:¹

(i) *Travaux préparatoires* are often extremely confused and confusing. They usually contain material supporting both the points of view in issue, as witness the fact that an appeal to the records by one of the disputants seldom fails to produce an appeal to another part of the same records by the other. States come to a conference with many views and intentions which are subsequently abandoned in the course of the conference; but it is not always clear that they were abandoned, and they may remain on the records as representing a view apparently maintained throughout. There are also particular cases that may cause difficulty. For instance, there is the State that disagrees at the conference with some part of the work, but nevertheless subsequently becomes a party to the treaty. Is it to be held to have changed its mind, or to have joined maintaining a different (and textually perhaps quite possible) interpretation?

(ii) *Travaux préparatoires* may be actively misleading, in various ways. For instance, it not infrequently occurs that the most important decisions taken, or the reasons for them, do not appear in the records at all. They are the result of private meetings and discussions between delegations, and the outcome appears as the actual text of some provision of the treaty, but the records will often give no indication of how or why it got there. In such cases, the earlier statements made by the participants are quite misleading, while the later statements, which would correct them, are made in private, and are, so far as the official records go, non-existent. Delegations also have very diverse motives for making or not making statements at a conference. Silence does not always mean agreement, and the records sometimes show an apparent unanimity that did not really exist. At other times they often give an appearance of undue prominence to the views of the more vocal delegates. Some delegates are in the habit of making elaborate explanatory

in those cases where recourse has in fact been had to *travaux préparatoires*, the result has usually been to confirm the interpretation independently arrived at by a study of the text, and that such confirmation has great value, if only by way of reinforcement. Professor Lauterpacht, for instance, has argued with much force that an ounce of proof of what a text means, derived from a clear statement of intentions is worth a ton of logical deduction, and has suggested that the Opinion of the Court in the *Injuries* case would have gained greatly in authority had it been supported by a reference to those parts of the San Francisco records which indicated that the failure *expressly* to confer international personality on the United Nations Organization was not intended to rule it out. There is weight in these views, but the problem is ultimately one of the balance of advantage. Admitting recourse to *travaux préparatoires* where the meaning of the text cannot otherwise be arrived at, is there a sufficient case for a *quasi-habitual* recourse, as being, so to speak, a potentially profitable speculation?

¹ For a fuller statement of the whole matter, see Sir Eric Beckett's observations in *Annuaire of the Institute of International Law* (1950), 2, pp. 437-44.

statements; others, for various reasons, are not. Yet it does not follow that the former carried the greatest weight or represented the general view. In these ways, a perusal of the records several years afterwards, by someone who was not there on the occasion, may produce a totally misleading impression. In brief, the difficulty of deciding on the exact weight to be attached to different utterances, or to the fact of non-utterance, is a very real and serious one (quite as great as that of interpreting the text of the Treaty itself), and to all those with experience of such conferences it would seem optimistic in most cases to regard it as satisfactorily accomplished. An habitual practice on the part of international tribunals of referring to the records could also have a very similar effect on the minds of delegations as that which would be made on government officials if their official minutes were liable to be produced and read in Court. Progress at an international conference depends very largely on the assumption (in fact normally made by delegations) that what will count is the ultimate agreement arrived at, and the text in which it is embodied, not what has been said in the course of the proceedings.¹

(iii) The object of reference to *travaux préparatoires* is to ascertain the intention of the parties. There are grounds for thinking, however, that where disputes about the meaning of a text arise, it is precisely because such intentions were lacking or did not exist as a common or general intention.² If so, then in most cases reference to the records will be, at best, futile, and quite possibly mischievous. If the Court seeks to presume an intention on the part of the parties, it can only do so by arbitrarily imputing to them something they never had in common.³ Thus it may well be just in those

¹ Another way of putting the same basic point would be to say that in most cases the effect of reference to the *travaux préparatoires* is to reopen the very controversies that were supposed to be settled by the text. If genuine obscurities necessitate this, well and good—otherwise it seems gratuitous. Moreover, it must tend to involve tribunals in something more than mere interpretation, namely, taking a position on the merits of the *original substance* of the issue, which is not their function.

² Apart from instances of deliberate bad faith on the part of one of the parties, the main cases are: (1) the point never occurred to the parties at all, but arose afterwards; (2) it did occur to them, but they could not agree about it, and contented themselves with an ambiguous or non-committal clause, in the belief or hope that the issue was secondary or would never arise (given the ulterior motives that frequently actuate States in concluding treaties, this is a common case); (3) they thought they were agreed, but in fact were not, because they understood the language or the terms used in different senses. These three cases probably make up about 95 per cent. of all those in which disputed points of interpretation arise. In none of them will recourse to the records advance matters.

³ The illusory and almost fictitious character of the conception of the intention of the parties, *when divorced from what is in the text itself*, is readily seen by considering the following case: suppose that two States, being in dispute about the meaning of a treaty clause, refer the matter to a court, and the court decides in favour of the interpretation upheld by one of them and against that contended for by the other. The losing State may well be prepared to accept the finding as being correct *as a matter of the legal interpretation of the text*: it will seldom if ever accept it as a correct rendering of what its own intention was. In what sense then has the court given effect to the intentions of the parties, and in what sense could it ever have done so in the circumstances? What a court really does in such a case (which is in fact the normal case and in no way excep-

cases of obscurity that seem to call for recourse to the records that such recourse will be of least practical value. It is perhaps for this reason that, in so many cases of reference to preparatory work, the result has merely been to confirm an interpretation already arrived at on the basis of the text. In brief, the utility of the recourse is mainly confined to those cases where it could in fact have been dispensed with. Where, however, there is obscurity in the text, the investigator will probably be faced with it in the records also: in other words, an obscurity in the text is usually a reflection of an antecedent obscurity, or of a lack of adequate agreement on the part of those who framed the treaty.¹

(iv) Finally,² as Judge Alvarez pointed out, there are the difficulties caused by the subsequent participation of States which took no part in framing the treaty, while some of the States which did, fail to become parties; and by the fact that the active operation of a treaty builds up a course of practice that overlays and tends to supersede the original intentions which the framers may have had.³ It would no doubt be possible to frame rules to meet these factors. But this could not remove the element of artificiality thus introduced into the conception of the intentions of the parties. In this respect there is a significant difference between multilateral international instruments and private law contracts, where the original parties or their legal successors are, and remain, the same and the only parties.⁴

tional) is not to give effect to the intentions of the parties, but to *find* that the intention maintained by one of them as being correct is the one duly reflected in the text, and that this is what the treaty *means* (the legal consequences of this may be several, but they are in any case extraneous to the issue of interpretation). There is probably only one real type of case in which a dispute in interpretation arises despite a genuine original common accord between the parties, as to which see below, n. 1.

¹ The only important class of case where a disputed point of interpretation is likely to arise despite the existence of a genuine original common intention on the part of the parties is where, though in agreement, they failed (through drafting oversights or otherwise) to express themselves clearly in the text; and subsequently, one of the parties, having changed its mind, tries to take advantage of the ambiguity to urge a different interpretation. *Ex hypothesi*, however, all such cases are characterized by a more or less manifest ambiguity in the text, such as would justify a reference to the records. This type of case probably accounts for the small percentage of disputes in which recourse to *travaux préparatoires* achieves any *positive* result other than to confirm or reinforce an interpretation already clear on the face of the text.

² This consideration is clearly confined to the case of general multilateral conventions.

³ So much so, that the records of a conference, re-read after a term of years, often seem oddly unreal: those concerned appear greatly exercised over things that subsequently never mattered, while oblivious to much that afterwards gave rise to difficulty.

⁴ Equally, analogies drawn from the action of a municipal court in ascertaining and giving effect to 'the intentions of the legislature', when interpreting a statute, are often not apposite, because members of the legislature are not themselves *as such* ranged on opposite sides in the dispute. They do not appear in court and maintain that they had special motives or intentions in passing the statute, different from those possessed by other members of the legislature. It is the subject or private citizen who is questioning what the statute means, and what the legislature intended. In the case of an international instrument, on the other hand, it is the very entities which were responsible for the act in question which are in dispute as to what it means, and as to what their motives and intentions really were.

(e) *The Court's formulation of Principles III and IV. Principle of Integration (treaties to be read as a whole). Principle of Effectiveness (ut res magis valeat quam pereat).* These principles are subordinated to the first two, because otherwise they would be liable to lead to a purely teleological method of interpretation which the Court declined to follow. Subject to this, they were endorsed by the Court.

(i) *The principle of integration* was really formulated by the Court when it stated (see above, p. 10) that the first duty of a tribunal 'called upon to interpret and apply the provisions of a treaty' was to give effect to them in their natural and ordinary meaning 'in the context in which they occur'.¹ It is clear that in the *Injuries* case also, the Court *in fact* applied the principle of integration, by inferring a certain status and capacity for the United Nations Organization, as a necessary consequence of the provisions of the Charter taken as a whole. In the *South-West Africa* case, Judge de Visscher gave the following particular statement of the integration principle (*I.C.J.*, 1950, 187):

'It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others. This rule is particularly applicable to the interpretation of a text of a treaty of a constitutional character like the United Nations Charter, . . .'

In the *Peace Treaties* case (2nd Phase), Judge Read (*I.C.J.*, 1950, 235) stated the principle as follows in the form of a quotation from an Advisory Opinion of the Permanent Court of International Justice (Series B, Nos. 2 and 3, p. 23):

' . . . the treaty must be read as a whole, and . . . its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.'

Judge Azevedo also, in the *Peace Treaties* case (*ibid.* 250), said:

' . . . a strict interpretation limited to an examination of one text only and which takes as its data a partial intention of the parties, cannot, in my view, prevail. . . . On the contrary, I believe that the treaties should be interpreted as a whole, having regard to the purposes embodied therein.'

There is nothing in the expressed views of the Court which differs from these pronouncements of Judges Read and Azevedo, considered simply as statements of principle. The Court has differed only in its application of the principle, and, in particular, in its views as to the manner of its subordination to Principles I and II.

(ii) *The principle of effectiveness (ut res magis valeat quam pereat)* was applied by the Court in the *Injuries* case, and in the *Corfu* case (Merits). In

¹ There is nothing to limit the application of this *dictum* to the case of words or phrases alone, in the context of a clause. It applies equally to that of an entire clause or article in the context of the treaty as a whole.

the *Injuries* case, the Court, while basing its view that the United Nations Organization had international personality on the language of the Charter and on the rights and functions therein conferred on the Organization, also considered that the Organization could not discharge the functions it was clearly intended to have unless it was regarded as being possessed of such personality (*I.C.J.*, 1949, 179):

'It . . . could not carry out the intentions of its founders if it was devoid of international personality.'

Equally, in considering whether the Organization must be deemed to have the capacity to bring an international claim on behalf of one of its servants injured in the course of performing his duties, in circumstances involving the responsibility of the State or Government in whose territory he was at the time, the Court cited the Advisory Opinion of the Permanent Court of International Justice in one of the International Labour Organization cases (Series B, No. 13, p. 18) in support of the following principle (*I.C.J.*, 1949, 182):

'Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

Finally, after examining the functions of the Organization under the Charter, the Court concluded (*ibid.* 184):

' . . . it becomes clear that the capacity of the Organisation to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.'

In the *Corfu* case the Court gave an express formulation of the principle of effectiveness in the following terms (*I.C.J.*, 1949, 24):

'It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. In this connexion, the Court refers to the views expressed by the Permanent Court of International Justice with regard to similar questions of interpretation. . . . In its order of August 19th, 1929, in the *Free Zones* case, the Court said (Series A, No. 22, p. 13) "in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects".'¹

The main problem with regard to the principle of effectiveness is to keep it within bounds, to prevent it from leading to judicial legislation (its natural tendency being teleological), and to preserve a due proportion between it and the textual principle. The Court has shown itself aware of this necessity, and has indicated the limits of the principle of effectiveness, and its subordination, in case of conflict, to that of the natural meaning. In the *Peace*

¹ Although these passages related to a special agreement between two parties to a dispute for its reference to, and adjudication by, the Court, the principle involved is quite general.

Treaties case (2nd Phase), the Court, after stating that it was 'the duty of the Court to interpret the Treaties, not to revise them', went on (*I.C.J.*, 1950, 229):

'The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.'

The same limitations were recognized by Judge Read (a strong advocate of the principle of effectiveness) in the following passage from his Dissenting Opinion in the same case, where he said (*ibid.* 238):

'In the cases which have been cited above, the Permanent Court went a very long distance by way of interpretation to give effect to the principle of effectiveness. . . . It is, however, necessary to admit that there is no instance in which the Permanent Court intimated that it would apply the principle of effectiveness if application involved doing violence to the terms of the treaty provisions under consideration.'

Judge Read did not think the interpretation he favoured would do violence to the terms of the Peace Treaties. Accordingly he stated the position as follows (*ibid.* 240):

'The problem of interpretation with which the Court is confronted is a choice between two possible constructions, neither of which does violence to the language of the Treaty¹ and both of which are based upon inferences drawn from the expressions actually used in the text.

'In these circumstances, it seems to be clear that the Court is not precluded from adopting either of the foregoing interpretations. . . .'

In these circumstances Judge Read thought that, of the two technically possible constructions, that one should be adopted which would give the treaty its maximum effect, or at any rate prevent it from being deprived of due effect, and he quoted (*ibid.* 235) another *dictum* of the Permanent Court (Series B, No. 7):

'An interpretation which would deprive the . . . Treaty of a great part of its value is inadmissible.'

(f) *The Court's formulation of Principle V (principle of subsequent practice)*

(i) *In general.* It is a fair inference from the attitude of the Court that, in its view, the subsequent practice of the parties in relation to a treaty is not only a legitimate guide to its correct interpretation, but probably a more reliable guide than recourse to *travaux préparatoires* or the attempt to ascertain the presumed intentions of the original framers. It should be observed, however, that strictly speaking, although it is convenient to

¹ This of course is precisely what the Court considered one of these constructions would have done, and therefore, because of the predominance of the principle of the natural meaning, must be rejected even though its application might have led to a more satisfactory outcome. As so often happens in such cases, the difference of view did not relate to the principle to be applied but to the effect of its actual application to the particular case.

classify the matter as a principle of interpretation, it is not really that so much as a rule of evidence. It is a question of the probative value of the practice of the parties as indicative of what the treaty means. The point was stated by the Court in the *South-West Africa* case (*I.C.J.*, 1950, 135):

'Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.'

In the (*Second*) *Admissions* case, the Court, having rejected recourse to the *travaux préparatoires* of the Charter, went on as follows (*ibid.* 9):

'The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only "if the Security Council recommends the applicant State for membership" (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 296 (IV), the very one that embodies this Request for an Opinion.'

Similarly, in the *Corfu* case (Merits) the Court said (*I.C.J.*, 1949, 25):

'The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation.'

This last pronouncement was referred to by Judge Read in his Dissenting Opinion in the *Asylum* case (*I.C.J.*, 1950, 323-4), where he quoted it and said:

'The *third test* relates to the understanding of the parties to the treaty as to its meaning, reflected by their subsequent action. It may be observed that this Court [in the *Corfu* case] relied upon an examination of the subsequent attitude of the Parties with a view to ascertaining their intention, when interpreting an international agreement.'

Judge Read then reviewed the practice of the parties to the Havana Convention of 1928, and concluded (*ibid.* 325-6):

'It is impossible to escape the conclusion that the parties to the Convention have acted over a period of twenty-two years upon the understanding that the use of the expression "urgent cases" was not intended to be a bar to the grant of asylum to political offenders. . . . Accordingly, the Peruvian interpretation fails to meet the third test [i.e. of subsequent practice].'

(ii) *Status of rules of procedure.* As regards the use of the rules of procedure of an international organization, or of its constituent organs, for the purpose of interpreting the constitutive instrument, to which the Court had recourse in the (*Second*) *Admissions* case, Judge Azevedo, in his Dissenting

Opinion in the same case, drew attention to a possible technical difficulty when he said (*I.C.J.*, 1950, 24):

'It is also superfluous to quote the texts of the Rules of Procedure, as these cannot be contrary to the law, of which they are only a complement.'

It is of course in one sense quite true that the rules of procedure of an organ such as the General Assembly of the United Nations cannot be employed to contravene or enlarge the constitutive instrument under which they are made, and must themselves be consistent with it. It may be argued, therefore, that they can equally not be made use of to *interpret* such instruments since they are dependent and consequential on them, and it is on the correct interpretation of the relevant instrument, in the first place, that the correctness of the rules may depend, rather than the reverse. On the other hand, the rules may afford evidence of the *view* of the instrument taken by those who framed the rules, and which has been accepted and acted on as correct. Such rules may therefore be illustrative of a common practice on the part of the parties to an international instrument, which may be evidence as to its correct meaning. It is in this sense that the Court's reference to rules of procedure must be understood.¹

(B) *Subsidiary interpretative findings*

1. *Necessity to give definite expression to positive rights and obligations, or to specific derogations therefrom.* This is perhaps not strictly speaking a rule of interpretation, but it usually arises in that form, and (as a rule of interpretation) might be stated as follows: that definite rights and obligations, or specific derogations therefrom, cannot be read into treaty provisions by a process of inference, unless this is a *necessary* and not merely a *possible* consequence of the language used. This rule appears as a general inference from the findings of the Court in the (*First*) *Admissions* and *Peace Treaties* (2nd Phase) cases and that part of the *South-West Africa* case which dealt with the alleged obligation to place mandated territories under trusteeship. In the (*First*) *Admissions* case, the Court refused to read into a provision the existence of a right which was a possible but not a necessary implication of a clause which, in the Court's view, did not *prima facie* envisage that right.² In the *Peace Treaties* (2nd phase) case, the Court refused to infer the existence of a right to have recourse to a procedure not provided for or, in its

¹ Where there is a common practice on the part of parties to a treaty, it may go even farther and constitute a means whereby the strict effect of the treaty can be modified, as witness in the United Nations the practice of the Security Council whereby the abstention of a permanent member does not count as an adverse vote or 'veto'. Thus, although in strictness rules of procedure cannot be used to amend a treaty, and are *ultra vires* and void if contrary to the parent instrument, yet, if in fact acted upon, they may lead to the establishment of a practice having that result; and in any case are effective as one criterion of interpretation amongst others.

² For a fuller discussion see the Third Part of this study, to be published in this *Year Book* for 1952, and see below under 2 and 3 of the present section.

view, *prima facie* contemplated by the Peace Treaties, even though this procedure was not actually excluded by the language used.¹ In the *South-West Africa* case, the Court, in the absence of any express provision obliging Members of the United Nations to place mandated territories under trusteeship, refused to imply such an obligation as an inference from certain provisions of the Charter, even though, as Judge de Visscher showed in his Dissenting Opinion, such an inference was not an impossible one from the language used. The Court said (*I.C.J.*, 1950, 140):

‘Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.’

The same principle in regard to *derogations* from rights or obligations was expressed by Judge Read in the *Peace Treaties* case (2nd Phase), where he said (*ibid.* 241):

‘There have been many instances in Treaties, especially in those dealing with the limitation of armaments, in which express provision has been made for “escape” or “escalator” clauses. . . . There is none in modern treaty practice in which an escape clause has been established, *based on implication* . . .’ (*italics added*).

It is interesting to note that the attitude of the Court in each of these cases really flowed from adherence to major principles I and II. In the *Peace Treaties* (2nd phase) and *South-West Africa* cases, at any rate, the Opinions of the dissenting Judges had, in general, been based on the view that a certain interpretation was required in order to give the treaty its fullest effect and prevent certain objects from being frustrated. Since this interpretation was in their view a *possible* one, which would not do actual violence to the language employed, they thought it ought to be adopted. The Court’s view is therefore authority for the proposition that in fact violence *is* done to the terms of a treaty (and consequently to major principle II) whenever the existence of a right, obligation, procedure, &c., not expressly provided for in the treaty or *prima facie* contemplated by it, and not a *necessary* consequence of the terms employed, is nevertheless read into it as not being actually incompatible with those terms, while tending to promote the objects of the treaty. The guidance given by the Court on this matter cannot fail to be of value. All those concerned with the interpretation of texts know how difficult is the type of case where something is neither included nor excluded, or where it is a possible but not a necessary inference from the text. In such cases there are two modes of approach. According to one, if the matter in question is not actually excluded, and if a useful purpose would be served by inferring it, and the text affords a possible basis for drawing such an inference, then it may legitimately be drawn. According to the other approach, if a thing is not expressed, it is not, generally speaking,

¹ See above, p. 22, n. 2.

permissible to infer it as merely not being inconsistent; it must *follow* from the language used, as a necessary consequence of the terms of the treaty. The Court clearly favours the second of these approaches.¹

2. This rule (for a statement of which see under § 3 (B) 2 above) is really a special application of the previous one, and involves the proposition that remedies or sanctions for breaches of a treaty cannot be read into it as mere inferences from its terms, still less on the supposition that a remedy or sanction of some kind must be presumed to have been intended. It was applied in the *Peace Treaties* case (2nd Phase), when the Court declined to authorize the setting up of a tribunal which would, in its view, have been different from the tribunal contemplated by the Treaties, even though it was the default of certain of the parties which had rendered the setting up of the tribunal in the form contemplated impossible. The Court referred (*I.C.J.*, 1950, 229) to 'the impossibility of remedying this situation simply by way of interpretation', and added that it was not justified 'in exceeding its judicial function on the pretext of remedying a default for the occurrence of which the Treaties have made no provision'. Consequently (*ibid.*):

'The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties.'

3. This rule (for a statement of which see § 3 (B) 3 above) arose out of the same situation, and was applied by the Court in the *Peace Treaties* case (2nd Phase). The power given to the Secretary-General of the United Nations to appoint the neutral member of the arbitral commissions envisaged by the Peace Treaties was, the Court found, intended to *assist* the parties *mutually*, in case they could not agree on a neutral member. It was not intended to be employed as a *remedy* on behalf of one party against another, even if the latter was in default as regards co-operating in the setting up of the tribunal (*I.C.J.*, 1950, 227):

'The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.'

4. *Legal effect of preambles to treaties.* It is sometimes thought that the preamble to a treaty, because it does not—or should not—contain any

¹ It is evident that while the first method may sometimes be legitimate in particular cases, any general tendency to adopt it would necessitate the insertion in treaties of many more restrictive and limiting clauses than they are normally thought to require so long as the position holds good that *in principle* nothing that is not actually contained in a treaty can be regarded as forming part of it.

An effect very similar to that resulting from the Court's approach would often be produced if, in considering how far a given inference is legitimate, the text were transposed into the sort of form that it would have had to take if the terms to be inferred had actually been expressed. It will then usually be much clearer whether the inference is a legitimate one or not.

substantive provisions but consists of a recital of facts and motives, is part of the treaty only in the physical or textual sense, and has no legal effect. But, in fact, a preamble does have legal force and effect from the *interpretative* standpoint. It usually contains a statement of the motives or objects of the parties in making the treaty, and can therefore be used as a guide and aid in interpreting the directly operative clauses. This is so in two ways especially: (1) in order to elucidate the meaning of clauses the purpose of which might otherwise be doubtful; (2) to indicate the juridical 'climate' in which the operative clauses should be read, whether for instance liberally or restrictively, broadly or strictly. It was for this latter purpose that the Court made use of the preamble to a treaty in the *Asylum* case (*I.C.J.*, 1950, 282):

'The object of the Havana Convention, which is the only agreement relevant to the present case, was, as indicated in its preamble, to fix the rules which the signatory States must observe for the granting of asylum in their mutual relations. The intention was . . . to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness.'

Accordingly, the Court took the view that the Convention must be interpreted strictly as having a generally restrictive intention.¹

5. *Expressio unius est exclusio alterius*. The Court in effect applied this principle in the (*First*) *Admissions* case, when it held that the specifying of certain conditions as necessary for admission to the United Nations excluded the right to make admission dependent on other conditions.²

DIVISION B: MISCELLANEOUS TREATY POINTS

§ 1. THERE MAY BE AN OBLIGATION TO ENTER INTO NEGOTIATIONS FOR, BUT THERE CANNOT BE AN OBLIGATION TO CONCLUDE, AN AGREEMENT. In the *South-West Africa* case, the Court had to consider the possibility that a State administering a territory under a mandate from the former League of Nations might be under an obligation, by reason of Chapter XII of the Charter, to place the territory under the United Nations trusteeship system, or at least to enter into negotiations with that object. The Court declined to hold that there was any obligation to place such territories under trusteeship, for several reasons, amongst them that the Charter provided for the conclusion of agreements on the subject and, so the Court found (*I.C.J.*, 1950, 139):

'An "agreement" implies consent of the parties concerned, including the mandatory Power in the case of territories held under Mandate. . . . The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party.'

¹ Judge Read in his Dissenting Opinion also made use of the preamble (*I.C.J.*, 1950, 318), though for a different purpose, viz. to show that the parties to the Havana Convention dealt with asylum as an existing institution. It must therefore, in his view, be deemed to retain all its customary incidents except in so far as expressly abolished or curtailed by the Convention.

² This case is discussed in the Third Part of this study, to be published in this *Year Book* for 1952.

The Court found in effect that an obligation to conclude an agreement is really a contradiction in terms and cannot exist. There may be an obligation to *negotiate* (though the Court refused to imply one in the *South-West Africa* case), and in fact there often are instances of countries undertaking to enter into negotiations on a given subject, or with a given purpose. But such an undertaking does not and cannot imply an undertaking, or an obligation, actually to reach agreement.¹

§ 2. THE CLAIMING OF RIGHTS ENTAILS SUBMISSION TO THE CORRESPONDING OBLIGATIONS. In the *South-West Africa* case (*I.C.J.*, 1950 133), the Court also made the point (the authoritative re-statement of which is none the less desirable because of its self-evidence) that a party to a treaty cannot claim rights under it, or rights which can only exist on the basis of the treaty or be derived from it, without at the same time being willing to discharge the corresponding obligations. This matter has already been discussed in the First Part of this study.²

§ 3. CONSENT OR AGREEMENT NOT TO BE IMPLIED IN THE ABSENCE OF A MUTUAL *ANIMUS CONTRAHENDI*. Judge Read pointed out in the *South-West Africa* case (*I.C.J.*, 1950, 170-1), that agreement could not be implied from a mere series of unilateral statements. There must be what he called a 'meeting of the minds', and equally an intention to contract:

'It is unnecessary to discuss the juridical nature of an international agreement. It is sufficient, for present purposes, to state that an "arrangement agreed between" the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of the minds; and an intention to constitute a legal obligation.'

Judge Read then went on to review the series of statements and communications made by the Government of the Union of South Africa, from which the Court inferred (and ascribed to the Union) agreement to the United Nations assuming in respect of South-West Africa certain functions of the former League of Nations. Judge Read, however, thought that the General Assembly of the United Nations and the Government of the Union had never been *ad idem*, and that the latter had certainly never intended to enter into any binding commitments. Hence he thought it

'... necessary to conclude that there was no arrangement agreed between the Union and the United Nations, in the matter of report, accountability and supervision'.

The essence of this view is that a series of statements or communications,

¹ The element of good faith (the necessity for which the Court has several times stressed) must be presumed to exist. There is no point in agreeing to negotiate if not with the object of reaching agreement *if possible*, or in entering into negotiations merely in order to bring about a breakdown. It is probable that an agreement to enter into negotiations implies a promise to use all *reasonable* endeavours, in the circumstances, to reach actual agreement.

² See this *Year Book*, 27 (1950), p. 8 (Chapter I, Division A, § 5).

whatever willingness they may seem to imply, do not amount to binding commitments unless they are clearly made with the *intention* of giving consent, or of entering into an *agreement*, or in circumstances in which they must have that effect; and, moreover, that it is necessary that the two parties should be talking about the same thing and using terms and expressions in the same sense. Judge Read thought that when the Union Government spoke of furnishing reports, it was clearly doing so in a different sense, on a different plane of meaning as it were, from that in which its communications were received and understood by the General Assembly. The Court's disagreement with this view was more on the facts than in relation to the principle involved.

§ 4. *RES INTER ALIOS ACTA*. In the same case, Judge Read gave an interesting statement of another principle, the authoritative re-statement of which is welcome, that the rights of parties to one treaty cannot, as such, be affected by what is said in another treaty, or by the fact that some of the parties to the first treaty subsequently conclude another and different treaty. Such action affects the rights of these other parties *inter se*, but cannot destroy or affect the rights of the remaining parties who do not join in the subsequent agreement. He summed up this view in the passage already quoted in the First Part of this study.¹

§ 5. CLAUSES CONFERRING FUNCTIONS OR POWERS ON INTERNATIONAL AUTHORITIES (such as the Secretary-General of the United Nations). In the *Peace Treaties* case (2nd Phase), the Court found that such powers must by their very nature be strictly interpreted, and confined to the case expressly provided for. This point will be discussed, in connexion with the position of international organizations, in the Third Part of this study to be published in this *Year Book* for 1952 (and see above, p. 24).

§ 6. ALTHOUGH A TREATY CANNOT BE INVOKED AGAINST A STATE NOT A PARTY TO IT, THAT STATE MAY BE SUBJECT TO SIMILAR OBLIGATIONS ON OTHER GROUNDS. The findings of the Court involving this point in the *Corfu* case (Merits) have already been noticed in another connexion.² In the *Asylum* case also (*I.C.J.*, 1950, 276), the Court stated that 'The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State', but went on to consider the contention 'that this Convention has merely modified principles which were clearly recognized by Latin-American custom, and that it is valid against Peru, as a proof of customary law' (and found that in fact the existence of the custom

¹ See *loc. cit.*, p. 16 (Chapter I, Division A, § 15).

² See Chapter I, Division A, § 3 (b) (i) of the First Part of this study in this *Year Book*, 27 (1950).

in question had not been established, at any rate in a manner binding on Peru). There is a complementary aspect of this matter to be noticed, namely, that just as major law-making conventions may be declaratory of pre-existing custom, so may they also be the source of future obligations, even for countries not actually parties to them, if the rules they embody gain such wide acceptance in practice as to pass into the general corpus of the law of nations.

§ 7. TERMINATION OF TREATIES BY COMMON CONSENT OF THE PARTIES. The general principle involved, which was stated by Judge Read in the *South-West Africa* case (*I.C.J.*, 1950, 167), was discussed in Chapter I, Division A, § 14, of the First Part of this study in this *Year Book*, 27 (1950). Common consent always affords a means of terminating a treaty if other means are lacking, e.g. if the treaty contains no provision for termination or for its denunciation by individual parties, and if no right to terminate upon giving reasonable notice can be inferred.

CO-ORDINATION IN INTERNATIONAL ORGANIZATION: AN INTRODUCTORY SURVEY¹

By C. WILFRED JENKS

I. INTRODUCTORY

1. DURING recent years the framework of international organization has become increasingly complex. It now includes: a general international organization, the United Nations, operating through six principal organs each having certain independent powers and through a wide range of subsidiary organs; ten specialized agencies in relationship with the United Nations;² various emergency agencies of the United Nations and other semi-autonomous United Nations bodies; a wide range of regional organizations of varying importance and functions; and a large number of miscellaneous inter-governmental organizations. A large proportion of these organizations have been created since 1945 and a large proportion of the remainder have been reorganized during the same period.

2. The mutual relations of these various bodies have rapidly become one of the key problems of international organization. The cornerstone of successful international organization is the maintenance of international peace and security, and experience has shown that the maintenance of peace and security presupposes the protection of human rights and freedoms, but subject to these basic conditions being fulfilled the effectiveness of international organization for a generation or more to come will depend primarily upon placing on a satisfactory basis the mutual relations of these

¹ This article outlines some of the leading ideas which will be elaborated in a book to be entitled *Co-ordination in International Organisation* which it is hoped to publish as one of the Cambridge Studies in International and Comparative Law published by the Cambridge University Press. Certain parts of it are based on a series of lectures delivered in July 1950 at the Hague Academy of International Law, which have since been published with the title 'Co-ordination: A New Problem of International Organisation', in *Recueil des Cours*, vol. 77 (1950) (ii).

The following recognized abbreviations are used: A.C.C. = Administrative Committee on Co-ordination; E.C.L.A. = Economic Commission for Latin America; F.A.O. = Food and Agriculture Organization; G.A.T.T. = General Agreement on Tariffs and Trade; I.C.A.O. = International Civil Aviation Organization; I.C.S.A.B. = International Civil Service Advisory Board; I.L.O. = International Labour Organization; I.M.C.O. = Inter-Governmental Maritime Consultative Organization; I.R.O. = International Refugee Organization; I.T.O. = International Trade Organization; I.T.U. = International Telecommunication Union; N.A.T.O. = North Atlantic Treaty Organization; O.A.S. = Organization of American States; O.E.E.C. = Organization for European Economic Co-operation; P.S.O. = Pan-American Sanitary Organization; T.A.B. = Technical Assistance Board; T.A.C. = Technical Assistance Committee of the Economic and Social Council; U.N.E.S.C.O. = United Nations Educational, Scientific, and Cultural Organization; U.N.I.C.E.F. = United Nations International Children's Emergency Fund; U.N.R.R.A. = United Nations Relief and Rehabilitation Administration; U.N.R.W.A.P.N.E. = United Nations Relief and Works Agency for Palestine and the Near East; U.P.U. = Universal Postal Union; W.H.O. = World Health Organization; W.M.O. = World Meteorological Organization.

² Plus an interim commission for a further specialized agency—I.M.C.O.

various international bodies which have been entrusted with shares of the common task.

3. There are fundamental political reasons of both a structural and a tactical character for which this is so. Let us view the matter first in structural terms. The superimposition of an anarchy of competing international agencies upon a system of anarchic relations between sovereign states would create inextricable confusion which would be liable to cause serious prejudice to the whole effort to devise adequate arrangements for the conduct of international public affairs. The penalty for ignoring the numerous interactions between the different branches of public policy when framing plans for international action is that it becomes impossible to deal effectively on an international basis with any one of the branches of public policy which are thus artificially disassociated. Political, economic, and social objectives which are mutually incompatible cannot be successfully pursued simultaneously for indefinite periods. Co-ordination between the different branches of public policy must be secured at some level, for a greater or lesser area, if complete chaos and frustration are to be avoided. If the required co-ordination is not secured at the international level, it will be necessary to secure it at the national level. If this occurs, national action of a potentially disruptive character is liable to be substituted for co-operative international action, and the policies evolved within their respective spheres by the different international bodies will frequently fail to secure practical application. If, on the other hand, the action taken to co-ordinate internationally the policies of the different bodies loses touch with the national policies of which they are the result, such international action is equally unlikely to be practically effective.¹ The elements of the necessary compromise between these conflicting considerations are to be found mainly in the common sense, good judgment, mutual respect and confidence, and sense of timeliness without which no political system can be made to work successfully. Seen in this perspective, the problem of co-ordination resolves itself largely into that of institutionalizing opportunities for these forces to gain strength, and the provision of such opportunities has perhaps been the most important service of the various bodies entrusted with functions of co-ordination in the United Nations system. But a fundamental question of political structure is also involved. One of the primary tests of a complex political system is whether it 'lacks strength because its powers are divided, lacks promptness because its authorities are multiplied, lacks wieldiness because its procedures are roundabout, lacks efficiency because its responsibility is indirect and its action without competent direction',² or whether, on the contrary, the devolution of responsi-

¹ Cf. Salter, *Allied Shipping Control*, Part V, International Administration: especially pp. 248-62.

² Woodrow Wilson, *Congressional Government*, 15th ed. (1901), p. 318.

bility for which it provides facilitates resolute and effective action by entrusting the powers necessary for this purpose to bodies better capable of such action within their respective spheres than an over-centralized system would be and ensuring the necessary co-ordination by methods of consultation and co-operation inspired by those of the British Commonwealth¹ rather than by the authoritarian methods of the Roman and Napoleonic traditions. In a political system which satisfies this test, complexity, so far from being a source of weakness, may be a source of strength.

4. The tactical considerations involved are equally fundamental. It is inevitable that the rapid growth of international organizations in so short a period in the midst of acute political and financial difficulties should have placed an unprecedented administrative and financial strain upon governments which was bound to produce a sharp reaction. In itself this is neither unnatural nor unhealthy. It is one of the conditions of effective international organization that governments should adapt their national machinery to enable it to transact a much larger volume of current international business than was customary during the inter-war period, and that much larger and more assured resources than were then available should be devoted to international effort. When such developments are taking place quickly, waste and inefficiency are always liable to occur, both nationally and internationally. In such circumstances it is both inevitable and necessary that new proposals for international expenditure and the adequacy of existing controls of policy, expenditure, and administration should be subjected constantly to the most vigilant criticism. Such criticism is an essential safeguard for the public interest and the public purse; it can play a supremely useful role by insisting on the concentration of effort necessary for work of high quality and lasting value; but it must not be allowed to blind us to the scale and complexity of the problems calling for urgent international attention, to the reality of the progress being made in dealing with them by international effort, even when such effort falls below the highest national standards, or to the overriding need for the United Nations system to develop into 'an ever visible, living, working organ of the polity of civilisation' functioning 'so strongly in the ordinary peaceful intercourse of states that it becomes irresistible in their disputes'.² The real limiting factor is that international institutions will have the confidence of responsible governments only if they show themselves to be fully conscious of the practical and political difficulties which confront such governments in everyday life and that they therefore cannot be developed effectively more rapidly than governments can make the national arrangements necessary to participate in and implement their work, or than public opinion is prepared to accept

¹ Cf. Harvey, *Consultation and Co-operation in the Commonwealth* (1952).

² Smuts, *The League of Nations—A Practical Suggestion* (1918), p. 8.

the responsibilities, adjustments of policy, and financial commitments involved in such participation. In these circumstances one of the primary criteria which must be borne in mind in determining whether the time is ripe for attempting to deal with a particular problem by organized international effort is the practicability of making the proposed international action effective by complementary national action. It is only in this broad perspective of the pace at which a new international structure resting on solid national foundations can, under existing political conditions, be firmly built that the present growing pains of the new framework of international organization can be intelligently appraised. There are, however, many indications that in this situation the progress made in securing effective co-ordination of the work of the different international bodies has come to be regarded in many quarters as the decisive test by which the value of international organisation, as such, and the extent to which it continues to deserve public support, must be judged.

5. There are also several angles from which the mutual relations of the various international organizations are of major significance for the future development of international law as a legal system.

6. While the importance of effective co-ordination is generally argued on political, administrative, and financial grounds, the extent to which such co-ordination is secured also has a direct bearing on the future development of international law. Among the sources of international law 'international custom as evidence of a general practice accepted as law' has always been accorded a leading place. Traditionally, international custom is to be deduced from the practice of states as reflected in: their legislation, judicial decisions, and treaty obligations in so far as these can be regarded as declaratory of their understanding of the law of nations; their attitude in international dealings as expressed in their diplomatic correspondence and otherwise, and other manifestations of their sense of legal obligation including established usage and the consensus of views of authoritative jurists.¹ As international law has developed, international arbitral awards² and, more recently, international judicial decisions³ have become increasingly important elements in the growth of international custom. With the development of international organizations, still another element has come to be of

¹ On the whole question see Corbett, 'The Consent of States and the Sources of the Law of Nations', in this *Year Book* (1925), pp. 25-30.

² See, for instance, Moore, *History and Digest of International Arbitration to which the United States has been a Party*, vols. iii and iv; Politis, *La Justice internationale*.

³ See, for instance, Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934); Beckett, 'Les Questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale', in *Recueil des Cours de l'Académie de Droit international de la Haye*, 39, pp. 135-269; 50, pp. 193-305; and Fitzmaurice, 'The Law and Procedure of the International Court of Justice', in this *Year Book*, 27 (1950), pp. 1-41.

far-reaching importance. The practice of states comprises their collective as well as their individual acts, and the number of occasions on which states are called upon to act collectively has been greatly increased by the activities of international organizations.¹ In regard to questions of recognition and state succession and a wide range of questions of treaty practice, the collective action of states has already become as important as their individual conduct,² and the tendency may develop farther. The functioning of international organizations has, moreover, created new legal problems and relationships which have prompted new developments in international practice. In these circumstances the practice of international organizations has become an important element in the growth of international law itself.³ In so far as such practice is uniform and is based on clear and consistent principles, it can be a major factor in the development of an effective system of international law. In so far as it is so varied and inconsistent that it tends to destroy the authority of existing principles and usage, or to make it difficult for new principles or usage to secure general acceptance, it can be a major retarding factor. It is therefore of primary importance for the whole future of international law that the practice of the different international organizations in regard to matters of international law should be sufficiently uniform to operate as a constructive influence in the development of the customary law of nations.

7. Similar problems arise in respect of the development of international law by legislative action. A wide range of organizations with general, functional, or regional responsibilities now frame legislative instruments for ratification or acceptance in some other form by states. A large proportion of the law governing current international relations consists of rules contained in such instruments. It is clearly imperative that the instruments adopted under the auspices of different organizations should remain consistent with each other if frustration and confusion are to be avoided; such frustration and confusion will inevitably be reflected either in failure to ratify instruments or in failure to apply instruments which have been ratified.

8. There is an analogous problem in respect of the international judicial process. Within the United Nations system, the International Court of Justice operates as the principal judicial organ of the specialized agencies as

¹ See, for instance, Geneva Research Centre, *Répertoire of Questions of General International Law before the League of Nations, 1920-1940*.

² Cf. Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', in this *Year Book*, 25 (1948), pp. 91-132; Rosenne, 'Recognition of States by the United Nations', *ibid.* 26 (1949), pp. 437-47; Aufricht, 'Principles and Practices of Recognition by International Organizations', in *American Journal of International Law*, 43 (1949), pp. 679-704.

³ Cf. Jenks, 'The Impact of International Organisations on Public and Private International Law', in *Transactions of the Grotius Society*, vol. 37 (1951).

well as of the central structure of the United Nations¹ and functions have also been entrusted to it in connexion with the Inter-American system, but in Europe there has recently been a tendency, which arises in part from the limitations of the jurisdiction of the International Court, to create new judicial organs for particular purposes on an important scale. This tendency involves a twofold danger, a danger of conflicts of jurisdiction in certain cases and a greater, because less measurable, danger that inconsistent decisions by courts with different traditions may prejudice the future unity of the law of nations in respect of matters regarding which uniform rules of world-wide validity are desirable.²

9. It is with these preoccupations in mind that we shall proceed to explore the legal and institutional aspects of the mutual relationships of the different international organizations.

II. SOME DETERMINING HISTORICAL AND POLITICAL FORCES

10. The complex structure under review may at first sight appear to involve so much waste and dispersion of effort and to be so devoid of any rational basis as to call for drastic modification.³ Such is indeed frequently the instinctive reaction of those who are brought into practical contact with it in responsible capacities for the first time, and there can, of course, be no question that such simplification and streamlining of this structure as is politically and administratively feasible is obviously desirable.

11. We will, however, be wise if, before making any *a priori* assumptions concerning future policy, we first attempt to understand more fully the historical and political forces which have produced the present situation.

The historical background of the present structure

12. The first major reason for the complexity of the existing structure is that this structure is the outcome of the rapid succession, in a period of less than fifty years, of seven distinct historical phases in the development of international organization which have been dominated by widely varying political forces. Each of these phases has made a significant and lasting contribution to the structure of international organization which exists today, but the total result is reminiscent of a ramshackle mansion to which succeeding generations have added what their own needs required while leaving as much as possible of the existing structure intact. Only recently has the Economic and Social Council undertaken the task of reviewing as a whole the miscellaneous arrangements which history has bequeathed

¹ The existence of provision for *ad hoc* tribunals and special procedures of interpretation for particular purposes does not seriously impair its position.

² Cf. Jenks, 'Regionalism in International Judicial Organisation', in *American Journal of International Law*, 37 (1943), pp. 314-20.

³ For a statement of this view see Laugier, 'Pour une réforme du Conseil économique et social', in *Politique Étrangère*, December 1951, pp. 313-24.

to us, with a view to ascertaining how far they still correspond to present needs and to what extent simplification of the existing structure is politically and administratively feasible.

13. The first phase—that preceding the First World War—was marked by the Hague Conferences and the development of the public international unions;¹ a number of the institutions created during this period, including the Permanent Court of Arbitration and the International Copyright Union, and, in a modified form, the Universal Postal Union, still survive.

14. The second phase was that of the establishment of the League of Nations and the International Labour Organization.² This phase, though decisive in the history of international organization, has left virtually no heritage of organizational complications. The Permanent Court of International Justice³ has been reorganized as, or in the view of some replaced by, the International Court of Justice; the I.L.O.⁴ has entered into relationship with the United Nations as the senior specialized agency; and various continuing functions of the League have been assumed by United Nations organs and specialized agencies under arrangements approved by the General Assembly.

15. The third phase was that following the decision of the United States not to become a Member of the League of Nations when it became clear that the League of Nations would not become a universal organization and a tendency developed to create new machinery outside the framework of the League. As the inter-war period ran its course, the tendency to create new organizations outside the League framework became more pronounced, partly because of the desire to facilitate United States membership of such organizations, sometimes because of a desire to restrict membership of such organizations to states directly concerned in the matters at issue, in one case (that of the Bank for International Settlements) because of the desire to place inter-central bank co-operation outside the field of direct political control.⁵

16. The fourth phase, which lasted from the final decline of the League

¹ For this phase see Woolf, *International Government* (1916); Sayre, *Experiments in International Administration* (1918).

² For the League phase see Walters, *A History of the League of Nations*, (2 vols., 1952); Zimmern, *The League of Nations and the Rule of Law*, 2nd ed.; Salter, *Recovery and Security*; Murray, *The Ordeal of This Generation*; Rappard, *International Relations as viewed from Geneva and The Quest for Peace*; de Madariaga, *Disarmament and The World's Design*; Viscount Cecil, *The Great Experiment*; Sir Frederick Pollock, *The League of Nations*; Fischer Williams, *Some Aspects of the Covenant of the League of Nations* (1934); Greaves, *The League Committees and World Order*; Hill, *The Economic and Financial Organisation of the League of Nations: A Survey of 25 Years' Experience*; and for a particularly critical view, Carr, *The Twenty Years' Crisis*.

³ For which see Hudson, *The Permanent Court of International Justice* (1934).

⁴ For which see Shotwell (ed.), *The Origins of the International Labour Organisation*; Phelan, *Yes and Albert Thomas*.

⁵ See, for instance, Einzig, *The Bank for International Settlements*; Beyen, *Money in a Maelstrom*, pp. 112-24.

to the signature of the Charter of the United Nations and largely coincided with the post-Atlantic Charter period of the Second World War, was a period of vigorous experiment in the creation of new international organizations on a functional basis. It was during this period that U.N.R.R.A.,¹ F.A.O.,² I.C.A.O.,³ the International Monetary Fund, and the International Bank for Reconstruction and Development⁴ were all created.

17. The fifth phase was that of the establishment of the United Nations, including the network of regional and functional commissions of the Economic and Social Council and the group of specialized agencies specifically designed to be brought into relationship with the United Nations as established by the Charter.⁵ It was during this phase that the reorganization of the Organization of American States as a regional agency of the United Nations was undertaken.⁶

18. The sixth phase is one of disillusionment with the immediate prospects of the United Nations. It has been characterized by a renewed tendency to pursue international action outside the United Nations in the hope of securing concrete results more readily by action limited to a restricted group of like-minded states. During this phase the reorganization of O.A.S. has been completed, O.E.E.C., the Council of Europe, the Brussels and North Atlantic Treaty Organizations, and the International Raw Materials Conference have all been created, and the creation of an effective and comprehensive regional organization for the Near and Middle East has been increasingly widely canvassed.⁷ This phase must be assumed to be a temporary one and it is imperative that it should be followed by a renewed effort to re-establish the position and influence of the United Nations, but its impact on the general structure of international organization will certainly be long-lived and may well be permanent.

¹ See *U.N.R.R.A.: A History of the United Nations Relief and Rehabilitation Administration*, prepared under the direction of George Woodbridge, New York, Columbia University Press, 1950; Robertson, 'Some Legal Problems of the U.N.R.R.A.', *this Year Book*, 23 (1946), pp. 142-67.

² For the background of the establishment of F.A.O. see Schultz (ed.), *Food for the World*, and Brandt, *The Reconstruction of World Agriculture*.

³ For the Chicago Conference and its background see Jennings, 'International Civil Aviation and the Law', in *this Year Book*, 22 (1945), pp. 191-209.

⁴ For the background of Bretton Woods see Harrod, *The Life of John Maynard Keynes*, pp. 525-85, and Beyen, *Money in a Maelstrom*, pp. 125-201.

⁵ For the preparation of this phase see Welles, *The Time for Decision and Where Are We Heading?* For the phase itself the *United Nations Yearbook* is invaluable; for current factual accounts of the activities of the United Nations, the specialized agencies, and other international organizations see the periodical, *International Organization*, published quarterly by the World Peace Foundation; for comments on current legal issues see the valuable Notes on Legal Questions concerning the United Nations contributed by Dr. Yuen-li Liang to each number of the *American Journal of International Law* since April 1948.

⁶ For which see the *Inter-American Juridical Yearbook*, 1948 and 1949.

⁷ For this phase see Barbara Ward, *The West at Bay and Policy for the West*; Ellis, *The Economics of Freedom*; Harris, *The European Recovery Programme*; Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations*; Mackay, *Western Union in Crisis*.

19. The seventh phase, which is European rather than international and overlaps with the sixth, is marked by an attempt to organize Western Europe on semi-federal lines. It is this phase which has produced the Treaty constituting the European Coal and Steel Community and the plan for a European Defence Community.

20. Such a description by phases of the organizational history of the last fifty years clearly does not tell the whole story and ignores innumerable cross-currents and eddies, but it does throw into sharp relief the manner in which the ebb and flow of changing political forces has exercised a determining influence on the complexity of the present structure.

The functional approach

21. The second major reason for the complexity of the existing structure is that the architects of the United Nations deliberately based their work on the principle of functional decentralization, both within the central machinery of the United Nations and as the basis of the relations between the United Nations and the specialized agencies. The reasons for this approach were partly transitory and partly permanent in character. No one could be certain before the Charter came into force whether it would be ratified by all of the Great Powers; recollections of 1919 were fresh in the minds of all and there was therefore a natural desire to secure the largest possible measure of co-operation in as many fields of international action as possible. There was also a widespread desire to give international co-operation in technical fields a maximum chance of success by removing it as far as possible from political influences and control; this desire found expression both in the creation of the Security Council and the Economic and Social Council as separate bodies and in the decision to vest primary responsibility in the more technical fields in specialized agencies. It was generally felt that too little of the past action of international organizations had been operational in character and that new operational activities could only be developed boldly by specialized bodies with considerable freedom of action. It was known from the outset that differences of economic and social philosophy and organization would make world-wide action in certain economic and social fields difficult of attainment, and this was an additional reason for devolving responsibility in these fields on specialized bodies. Another prospective advantage of such devolution was to facilitate the participation in economic and social co-operation of states which might not be called upon immediately to share in the responsibility for maintaining international peace and security. In addition, the breakdown of the League of Nations after a period of what appeared to be a steady consolidation of its authority suggested that it would be prudent to avoid making the success

of the various parts of the new international system wholly dependent on the ultimate success of the whole venture.

22. Arguments such as these for the functional development of international organization¹ gained a wide currency and, as we shall see when we come to consider the relevant provisions of the Charter and the professed intentions of its authors, exercised a far-reaching influence on policy.

Decentralization within the United Nations

23. This general approach has a marked influence on the central structure of the United Nations. The constitutional arrangements of the United Nations,² in contrast to those of the League, are based on a definite principle of decentralized authority. The Charter establishes six principal organs of the United Nations—the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat—and assigns functions and responsibilities to each of these organs in considerable detail. The General Assembly may discuss any questions or any matters within the scope of the Charter or relating to the powers and functions of any of the organs provided for in the Charter and, subject to one limitation, may make recommendations to the Members of the United Nations or the Security Council or to both on any such questions or matters.³ The limitation is that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the Charter the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.⁴ Under the Acheson Plan⁵ the General Assembly has been so organized as to be able to make recommendations on short notice at any time in respect of any question on which the Security Council has not taken effective action, and this limitation has lost most of its practical importance. In these circumstances the Assembly is increasingly assuming the role of the major, and indeed the only, co-ordinating authority for the United Nations as a whole, but there are obvious limits to the extent to which co-ordination can be effectively achieved through the debates of a large deliberative body. Subject to the powers of the General Assembly, responsibility for most of the work of the United Nations is entrusted to the three Councils, each of which has its own distinctive features.

¹ Notably Mitrany, *A Working Peace System* (1943).

² For which see generally Kelsen, *The Law of the United Nations and Recent Trends in the Law of the United Nations*; Goodrich and Hambro, *Charter of the United Nations*, revised edition; Ross, *Constitution of the United Nations—Analysis of Structure and Function*; Kaeckenbeck, 'La Charte de San Francisco dans ses rapports avec le droit international', in *Recueil des Cours*, 10 (1947), pp. 109–330.

³ Article 10 of the Charter. For the effect of such recommendations see Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations', in this *Year Book*, 25 (1948), pp. 1–33.

⁴ Article 12 of the Charter.

⁵ General Assembly Resolution No. 377 (V) of 1950.

24. The Security Council consists of five permanent members specified in the Charter—China, France, the U.S.S.R., the United Kingdom, and the United States—and six other members elected by the General Assembly for a term of two years. By the terms of the Charter, the Members of the United Nations confer on the Security Council primary responsibility for the maintenance of international security and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf;¹ they also agree to accept and carry out the decisions of the Security Council in accordance with the Charter.² Voting in the Security Council is governed by what is known as the Yalta Formula. Decisions of the Security Council on procedural matters are made by an affirmative vote of seven members; decisions on all other matters are made by an affirmative vote of seven members, including the concurring votes of the permanent members, provided that in decisions concerning the pacific settlement of disputes which do not involve enforcement action a party to the dispute shall abstain from voting. The will of the majority of the Security Council is liable to be made ineffective by this so-called veto in circumstances which may involve virtual paralysis of the action of the Council.³ In these circumstances the existence of the veto in the Security Council has become a major factor in the relationships between the various organs of the United Nations and has a bearing on certain aspects of the relationship between the United Nations and the specialized agencies, notably, since the admission of new Members to the United Nations requires a recommendation of the Security Council, in regard to the question of common or separate membership.

25. The Economic and Social Council and the Trusteeship Council, unlike the Security Council, both operate under the authority of the General Assembly and both decide all questions by a majority of members present and voting, but in other respects there are important differences between them. The Economic and Social Council consists of eighteen members of the United Nations elected by the General Assembly for three-year terms so arranged that one-third of the terms expire each year; there are no permanent seats, but retiring members are eligible for immediate re-election without limitation. The Trusteeship Council consists of the Members of the United Nations administering trust territories, such of the permanent members of the Security Council as are not administering trust territories, and as many other members elected for three-year terms

¹ Article 24 (1).

² Article 25.

³ Cf. Brierly, 'The Covenant and the Charter', in this *Year Book*, 23 (1946), pp. 83-94; Wortley, 'The Veto and the Security Provisions of the Charter', *ibid.*, pp. 95-111; Liang, 'The Settlement of Disputes in the Security Council: The Yalta Voting Formula', *ibid.* 24 (1947), pp. 330-59; Padelford, 'The Use of the Veto', in *International Organization*, vol. ii, no. 2 (1948), pp. 227-46; Rudzinski, 'The So-called Double Veto', in *American Journal of International Law*, 45 (1951), pp. 443-61.

by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations who administer trust territories and those who do not. The Trusteeship Council, while designating visiting missions to visit trust territories and working to some extent through committees of its own members, functions primarily as a Council.¹ The Economic and Social Council, as at present organized, maintains nine functional commissions consisting of representatives of from twelve to eighteen Members of the United Nations selected by the Council and three regional economic commissions which may make recommendations directly to Member governments and to specialized agencies as well as to the Council. The specialized agencies, though associated with the Trusteeship Council, play a less prominent and continuous part there than in the Economic and Social Council, their participation in which is based directly on the provisions of the Charter itself. There is no equivalent in the Trusteeship Council for the arrangements for consultation with non-governmental organizations which have been made by the Economic and Social Council in pursuance of the terms of the Charter.

26. The coexistence of the three Councils has important consequences for the general structure of the United Nations.

(a) All of the three Councils taken together do not cover the whole field of action of the United Nations and none of them has any residual jurisdiction comparable to the authority which the Council of the League of Nations shared with the League Assembly to 'deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world'. Under the Charter, the only body with such authority is the General Assembly itself.² The division of authority between the Councils has therefore made it necessary to create further bodies directly responsible to the General Assembly. Thus, the Committee on Information from Non-Self-Governing Territories³ operates independently from both the Trusteeship Council and the Economic and Social Council and its regional and functional commissions; the International Law Commission, the activities of which may impinge on those of all three Councils, reports directly to the General Assembly;⁴ and a serious problem will arise in regard to the

¹ On the whole question of trusteeship see Duncan Hall, *Mandates, Dependencies and Trusteeship*, and Sayre, 'Legal Problems arising from the United Nations Trusteeship System', in *American Journal of International Law*, 42 (1948), pp. 263-98; concerning the trusteeship agreements see Parry, 'The Legal Nature of the Trusteeship Agreements', in this *Year Book*, 27 (1950), pp. 164-85.

² Article 10 of the Charter.

³ See the publication, *Non-Self-Governing Territories—Summaries and Analyses of Information transmitted to the Secretary-General*, published each year by the United Nations.

⁴ For the reports of the Commission see U.N.Docs. A/925, A/1316, and A/1858. See also Liang, 'The General Assembly and the Progressive Development and Codification of International Law', in *American Journal of International Law*, 42 (1948), pp. 66-97.

relationship to the various parts of the United Nations structure of any special machinery which may be introduced in connexion with the implementation of the proposed Covenant of Human Rights.¹

(b) In so far as the maintenance of peace and security are concerned, the powers of the Security Council are not limited by those of any other body; but the division of authority between the Security Council and the Economic and Social Council has been an important factor in the creation of emergency agencies directly responsible to the General Assembly, such as the United Nations Relief and Works Agency for Palestine Refugees and the United Nations Korean Relief and Rehabilitation Agency, for dealing with the economic and social consequences of political emergencies.

(c) The existence of so much decentralization and division of authority has created in the United Nations a climate of decentralization which has certainly been a factor in the extent to which the Economic and Social Council has operated hitherto through the regional and functional commissions.

(d) None of the Councils has any budgetary authority; rules have now been adopted requiring the budgetary implications of contemplated decisions to be drawn to their attention but the responsibility for framing and voting the budgetary estimates necessary to implement their decisions does not rest with them. Their authority on matters of policy inevitably impairs, however, the budgetary control exercised by the General Assembly with the assistance and advice of the Advisory Committee on Budgetary and Financial Questions.

27. The complex structure resulting from the coexistence of the three Councils and the limited authority of all three of them has been further complicated by the desire to provide alternative means of taking action which would be subject to veto in the Security Council. This desire has led to the creation by the General Assembly of machinery supplementary and, in some respects, alternative to that of the Security Council, such as the Interim Committee of the General Assembly, the so-called 'Little Assembly', which meets as required in the intervals between sessions of the Assembly itself.²

28. This separation of powers within the central structure of the United Nations lies at the root of some of the most elusive problems of co-ordination, for it makes it difficult for the United Nations to speak with an

¹ See United Nations, Economic and Social Council, *Official Records, Thirteenth Session, Supplement No. 9—Commission on Human Rights, Report on the Seventh Session*.

² For the reports of the Interim Committee of the General Assembly, see U.N.Docs.: *Official Records, Fourth Session, Supplement No. 11 (A/966)*; *Official Records, Third Session, Supplement No. 10 (A/578, A/583, A/605, A/606)*; and *Official Records, Fifth Session, Supplement No. 14 (A/188)*. See also Coster, 'The Interim Committee of the General Assembly: An Appraisal', in *International Organization*, 3 (1949), pp. 444-58.

authoritative and consistent voice on related problems which are being dealt with by different organs.

29. It is, however, idle to criticize these complexities impatiently; they are the reflection of the political realities which have produced the United Nations in its present form and with which it must contend in order to develop into an effective world organization.

30. The separation of powers within the central structure of the United Nations was the price paid for a Charter acceptable to all the Great Powers which still allowed real influence within the Organization to the middle Powers and smaller states.

(a) In 1945 the special composition of the Security Council and the veto were the price paid for the acceptance of the Charter by at least one and perhaps two of the Great Powers.¹

(b) The establishment of a specially composed Trusteeship Council with equal representation of the administering Powers and other states was the price paid for the acceptance of the international trusteeship system by the administering Powers.

(c) The establishment as a separate body of the Economic and Social Council was influenced by the proposals for a Central Committee on Economic and Social Questions which had been under consideration by the Council of the League of Nations in 1939 as the result of the difficulty experienced by the League Council in dealing effectively with questions of international co-operation in the economic and social field simultaneously with the discharge of its political responsibilities.² There are, of course, significant differences between the 1939 proposals for a Central Committee and the position of the Economic and Social Council under the Charter and as it has developed in practice, notably that whereas the Central Committee was to have examined the budget for economic and social work as well as the programme, the Economic and Social Council has no budgetary responsibilities, but in evaluating the problems which now arise it is essential to keep in mind the historical background out of which they have developed.

31. The problem has been accentuated by the rapidity with which the machinery of the United Nations has evolved, which has increased the difficulty of inter-meshing its various parts, and there can be little doubt that in course of time it will to some extent be corrected by further developments in the parts played by the General Assembly and to some extent by the Councils. More particularly, the tradition of further decentralization to subsidiary organs within the sphere of each of the principal

¹ Cf. Lee, 'The Genesis of the Veto', in *International Organization*, 1 (1947), pp. 33-42.

² See League of Nations Doc. A. 23, 1939, 'The Development of International Co-operation in Economic and Social Affairs'.

organs which this separation of powers has tended to foster can be checked within the framework of the Charter by the necessary assertion of their authority by the General Assembly and the Councils, and there are welcome signs that the Economic and Social Council in particular is becoming increasingly aware of the extent to which effective discipline of its subsidiary organs and the retention of adequate control over newly created subsidiary organs is an essential element in successful co-ordination.

The specialized agencies

32. Simultaneously with the rapid development of the United Nations the specialized agencies have assumed their present form. Three of them, the I.L.O., the U.P.U., and the I.T.U., are well-established organizations which have modified their earlier constitutional arrangements in various respects since the Second World War. The others, although some of them inherit in varying degrees the experience of earlier bodies, are essentially new organizations which have been called upon to develop their internal organization and procedure, evolve their policies and programmes, establish effective links with their Members, lay the foundation for their future traditions, and establish satisfactory mutual relations in a very short period dominated by acute political strain.

33. Some of the specialized agencies have highly distinctive features. The I.L.O., which was established in 1919 in association with the League of Nations¹ and continued its activities throughout the Second World War,² amended its Constitution immediately after the war to extend and clarify its mandate and improve its procedures,³ and entered into relationship with the United Nations as the senior specialized agency in 1946,⁴ is a tripartite organization in which representatives of workers and employers enjoy equal status with those of governments.⁵ The relationship established by its Constitution between the International Labour Conference and national competent authorities, normally legislatures, to which Members of the Organization are under an obligation to submit all Conventions adopted by the Conference for consideration, is another unique feature of the I.L.O.⁶

¹ See Shotwell, *The Origins of the International Labour Organisation*, 2 vols.

² For the wartime activities of the I.L.O. see International Labour Office, *Official Bulletin*, vol. xxv.

³ See Jenks, 'The Revision of the Constitution of the International Labour Organization', in this *Year Book*, 23 (1946), pp. 303-17.

⁴ For the activities of the I.L.O. since 1946 see the *Report of the International Labour Organisation to the United Nations* published by the International Labour Office each year since 1947.

⁵ See Jenks, 'The Significance for International Law of the Tripartite Character of the International Labour Organisation', in *Transactions of the Grotius Society*, 22 (1936), pp. 45-81.

⁶ See Jenks, 'The International Labour Organisation as a Subject of Study for International Lawyers', in *Journal of Comparative Legislation and International Law*, Third Series, 22 (1940), pp. 36-56.

The Organization has played a major role in the improvement of industrial relations which has had a far-reaching influence on national industrial life in many countries, and has evolved a comprehensive international labour code covering a wide field of social policy.¹ A new emphasis in the work of the Organization has developed since the Second World War and its traditional legislative, informational, industrial relations, and technical assistance activities are being supplemented by activities of a more operational character, especially in the field of manpower.²

34. F.A.O.,³ U.N.E.S.C.O., and W.H.O. are primarily promotional organizations. A large part of their work consists of technical assistance. U.N.E.S.C.O. is in practice the least governmental in character of all the specialized agencies since its General Conference consists of delegates who vote as national delegations but are appointed after consultation with national commissions representative of the principal national bodies interested in educational, scientific, and cultural matters, and its Executive Board consists of persons chosen in a personal capacity by the Conference to act on behalf of the Conference as a whole.⁴ The World Health Assembly, in addition to powers to adopt conventions analogous to those of other agencies, has authority to adopt regulations on certain technical matters which come into force for all Members after due notice has been given of their adoption by the World Health Assembly, except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.⁵

The International Monetary Fund is primarily a device for granting financial assistance in meeting temporary maladjustments in their balances of payments to those Members who practise a definite code of exchange transactions conduct which involves obligations of mutual consultation before taking action which will have international repercussions.⁶ The Inter-

¹ See *The International Labour Code, 1951*, published by the International Labour Office, Geneva, 1952.

² See *The Director-General's Report to the 35th Session of the International Labour Conference, 1952*, chap. iii.

³ For the activities of F.A.O. see *Work of F.A.O.*, which is the annual report of the Director-General of F.A.O.

⁴ For a brief account see Besterman, *U.N.E.S.C.O.*, and for fuller particulars U.N.E.S.C.O. *Report to the United Nations*, published each year since 1949; see also Ascher, *Programme Making in UNESCO, 1946-1951*; Niebuhr, 'The Theory and Practice of UNESCO', in *International Organization*, 4 (1950), pp. 12-26.

⁵ For the activities of W.H.O. see *Work of W.H.O.—Annual Report of the Director-General to the World Health Assembly and the United Nations*, published each year since 1949; for the International Sanitary Regulations see World Health Organization, *Technical Report Series*, No. 41. See also Sharp, 'The New World Health Organization', in *American Journal of International Law*, 41 (1947), pp. 509-30.

⁶ See Halm, *International Monetary Co-operation*; Camille Gutt, 'Exchange Rates and the International Monetary Fund', in Seymour Harris (ed.), *Foreign Economic Policy for the United States*, and 'Les Accords de Bretton Woods et les institutions qui en sont issues', in *Recueil des Cours*, 72 (1948) (i), pp. 69-168; Kindleberger, 'Bretton Woods Reappraised', in *International*

national Bank for Reconstruction and Development, despite its name, is really a reinsurance guarantee corporation dependent on the support of the investment market for a large proportion of its operations. This need to retain the confidence of the investment market has made the Bank particularly allergic to any suggestion of political control of its loan policy through the United Nations or otherwise.¹

35. The specific functions entrusted to I.C.A.O. relate primarily to safety standards and the provision of adequate technical facilities for air navigation, but I.C.A.O. also has functions, mainly informational at the present stage, in relation to air transport.² The U.P.U. constitutes a single postal territory for the reciprocal exchange of correspondence.³ The I.T.U., on the other hand, is essentially a regulative agency, a characteristic feature of which is the provision made for the participation of recognized private operating agencies in its administrative conferences and international consultative committees.⁴ The I.M.C.O.,⁵ the Convention creating which seems likely to come into force in the relatively near future, is to be a purely technical organization of an advisory character with a specific obligation to recommend whenever possible that matters should be settled through the normal processes of international shipping business.

36. The Havana Charter, which it is now clear will not come into force, provided for the establishment of an International Trade Organization, the objects of which would include: the promotion of high levels of employment, production, and demand; fostering industrial and general economic development and encouraging the international flow of capital for productive investment; liberalizing commercial policy; checking restrictive business practices and monopolistic control and supervising in the public interest inter-governmental commodity control agreements. The Havana Charter also embodied an elaborate code of obligations covering wide sectors of economic policy.⁶

Organization, 5 (1951), pp. 32-47; Gold, 'The Fund Agreement in the Courts', in *International Monetary Fund Staff Papers*, 1 (1951), pp. 315-33; and the *Annual Reports* and *Summary of Proceedings* of the annual meetings of the International Monetary Fund.

¹ See the *Annual Report* of the Bank and *Summary of Proceedings* of the annual meetings of the Board of Governors of the Bank.

² See Jennings, 'Some Aspects of the International Law of the Air', in *Recueil des Cours*, 75 (1949) (ii), pp. 513-86; Pépin, 'Le Droit aérien', in *ibid.* 71 (1947) (ii), pp. 481-547; Virginia Little, 'Control of International Air Transport', in *International Organization*, 3 (1949), pp. 29-45.

³ Cf. *L'Union Postale Universelle — Sa fondation, son développement*, Mémoire published by the International Bureau of the U.P.U., 1949.

⁴ Cf. Tomlinson, *The International Control of Radio Communications*, and Mance, *International Telecommunications*.

⁵ For which see Parry in this *Year Book*, 25 (1948), pp. 437-57.

⁶ For an authoritative account by one of the authors of the Havana Charter see Wilcox, *A Charter for World Trade* (1949); see also Fawcett, 'The International Trade Organization', in this *Year Book*, 24 (1947), pp. 376-82. Pending the coming into force of the Havana Charter, a General Agreement on Tariffs and Trade, concluded at Geneva on 30 October 1947, provides for the provisional observance by the parties, to the fullest extent of their executive authority, of the

37. The range and complexity of the activities of the specialized agencies, the highly technical character of some of the functions entrusted to them, and the wide variations among them in structure and procedures¹ are essential elements in the problem of securing effective co-ordination of their activities within the general framework of the United Nations.

38. The basis on which the specialized agencies have been created implies, for reasons which are partly political and partly functional in character, that co-ordination of their activities must be sought by processes of consultation and agreement rather than by any attempt to concentrate powers of decision in a manner inconsistent with the nature of the structure which has been adopted. The tripartite composition of the I.L.O., the system of weighted voting adopted for the Fund and the Bank, the equal division of voting power in Commodity Councils between consuming and producing countries envisaged by the Havana Charter, and the reservation of places on the governing body or corresponding organ for states primarily concerned with the functions of the Organization to be found in the I.L.O., the Fund, the Bank, I.C.A.O., and I.M.C.O., are all devices designed to secure that the decisions of the specialized agencies represent a fair balance between conflicting interests and attribute due weight to the different forces which must be taken into account in order to formulate workable international policies. These arrangements are the equivalent, in the social and economic field, of the special composition and voting arrangements of the Security Council, and any scheme of co-ordination the practical effect of which was to substitute for them majority voting in the Economic and Social Council and the General Assembly could not, in the present stage of international development, give satisfactory practical results.²

39. The relationship of the I.L.O., with its tripartite character, and the inter-governmental organizations presents problems which are unique. The I.L.O. is based on the equality of status of government, employers', and workers' representatives, and the confidence which it has secured from

general principles of the Charter, and embodies reciprocal arrangements for the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce. The Agreement also provides that representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of the Agreement which involve joint action and, generally, with a view to facilitating its operation and furthering its objectives. Out of these meetings, which are known as G.A.T.T., arrangements alternative to the Havana Charter or certain parts thereof may develop.

¹ Concerning which see Jenks, 'Some Constitutional Problems of International Organizations', in this *Year Book*, 22 (1945), pp. 11-72; see also the notes on the constitutions of international organizations contributed by Mr. Clive Parry to the Documentary Section of this *Year Book*, vols. 23-26 (1946-9).

² Cf. Wellington Koo, Jun., *Voting Procedures in International Political Organisations*; Allan Hovey, Jun., 'Voting Procedure in the General Assembly', in *International Organization*, 4 (1950), pp. 412-27; Margaret Ball, 'Bloc Voting in the General Assembly', *ibid.* 5 (1951), pp. 3-31; Allan Hovey, Jun., 'Obstructionism and the Rules of the General Assembly', *ibid.*, pp. 515-30.

the partners in industry depends on this equality of status; its action could not be subordinated to the assent of some external authority without in effect reducing the status of employers and workers to an advisory level and therefore undermining their confidence in the Organization.¹ Co-ordination must therefore be secured by consultation and agreement rather than by authoritative decisions. In this respect there is a marked analogy between the relationship of the I.L.O. and other international organizations and the problems of national industrial life in countries where the voluntary action of the interested parties plays a major part in the regulation of industrial conditions and even in determining important aspects of the relationship between industry and the state.

40. Bodies with executive responsibilities, like the Fund and the Bank, the Commodity Councils provided for in the Havana Charter, or such emergency agencies as U.N.R.R.A. and the I.R.O., require considerable freedom of independent action in relation to deliberative bodies. They must act rapidly. It is frequently necessary, in order to avoid private profit being made at the public expense, that they should preserve the confidential character of the information on the basis of which they act and avoid premature disclosure of their intentions, whereas the proceedings of the Economic and Social Council and of the General Assembly are rightly given the fullest publicity.

41. It is characteristic of all the specialized agencies that they are the international nerve centres of regular co-operation between the national authorities responsible for action in their respective spheres; one of the reasons for creating them as specialized agencies was the desire to secure the direct participation in specialized international bodies of the national authorities which would have the primary responsibility for the detailed implementation of their policies and recommendations; failing such direct contacts with and between the authorities primarily responsible for economic and social policy, the volume and complexity of such business will inevitably result in much of it, despite its intrinsic importance and far-reaching impact on domestic policy, being dealt with at relatively junior administrative and diplomatic levels which are unlikely to be in a position to frame or implement far-reaching measures of a constructive character in the economic and social fields. The value of the specialized agencies as an instrument for maintaining such direct contacts is substantially enhanced by a reasonable measure of autonomy.

42. The concept of specialized agencies represents a major constructive advance in the development of international organization, but certain limitations and dangers are inevitably latent in it. It will be readily agreed that

¹ See International Labour Conference, Twenty-Sixth Session, Report I, *Future Policy, Programme and Status of the International Labour Organisation*, pp. 40-46.

it is undesirable to increase unduly the number of specialized agencies and it is arguable that the number of such agencies is already too large; there is now an understandable reluctance to create further specialized agencies which is unlikely to be overcome unless the case for the creation of a new agency on functional grounds is overwhelmingly strong. Nor can there be any question that the measure of autonomy to be enjoyed by specialized agencies and the arrangements to be made for proper co-ordination of their activities should be determined on the basis of the broadest considerations of general policy rather than upon trials of relative strength in particular circumstances. Subject to a clear understanding on these points, it will be widely recognized that it is essential to the success of the United Nations experiment in the social and economic field that it should draw vitality from the major specialized agencies and that it can do this only if they are given adequate scope for vigorous growth.

Regional arrangements and organizations

43. The third major reason for the complexity of the existing structure is the intensity in the modern world of regional sentiment and loyalties. There is no aspect of the new framework of international organization which is more complex than the provision made for meeting regional needs and aspirations. There are a number of regional arrangements which are essentially projections of the world system. The United Nations maintains regional economic commissions for Europe, Asia and the Far East, and Latin America, and has under consideration the establishment of a similar commission for the Middle East. The I.L.O. holds regular regional conferences for the American States, for Asia, and for the Near and Middle East, and has indicated its willingness to hold similar conferences in Europe as required; the Governing Body of the I.L.O. has also recently appointed an Asian Advisory Committee. A number of the other specialized agencies maintain regional offices in various parts of the world, and in W.H.O. the Constitution includes special provision for regional organizations and for arrangements whereby the P.S.O. will act as the regional organization of W.H.O. for the Western Hemisphere.¹ In addition to these regional arrangements of the United Nations and the specialized agencies, which are still in process of vigorous development, there are independent regional organizations in being or in embryo in various parts of the world.

44. In the Americas there is a system of regional organization as complex as that of the United Nations itself. The O.A.S. operates through Inter-American Conferences, Meetings of Consultation of Ministers of Foreign Affairs, a Council of the O.A.S., an Advisory Defence Committee, an Inter-American Economic and Social Council, an Inter-American Council of

¹ Articles 44-54.

Jurists, an Inter-American Cultural Council, and specialized conferences and organizations.¹ These arrangements are the outcome of a long tradition of inter-American co-operation² inspired, in the language of the O.A.S. Charter, by the conviction that 'the historical mission of America is to offer to man a land of liberty and a favourable environment for the development of his personality and the realisation of his just aspirations'. The inter-American system has several salient characteristics; it is essentially consultative in character; it is profoundly respectful of national sovereignty; its central dogma is the principle of equality of states; and it has a more predominantly diplomatic tradition than other international organizations.

45. In Western Europe there are a number of organizations with varying functions and membership and the future organizational pattern seems likely to be even more complex. A situation has now developed in which an emergency economic organization, the O.E.E.C., and a prospective long-term organization, the Council of Europe, to some extent overlap each other. Within both these organizations the Brussels Powers constitute a nuclear group and their organization, while relatively informal in character, is closely knit.

46. The Council of Europe differs markedly in character from all other existing organizations,³ both international and regional, notably in the inter-parliamentary character of its Consultative Assembly, which stands in sharp contrast to the inter-governmental organizations. The relations between the Committee of Ministers of the Council and the Consultative Assembly are unstable and still in process of development. A substantial element in the Assembly regards it as the nucleus of a federal parliament for Europe and, though there are obvious dangers in pressing too far an analogy which is far from perfect, in some ways relations between the Assembly and the Committee of Ministers tend to recall those between legislatures and governments in the period when representative government was still in the process of development into responsible government or in countries where the separation of powers still exists. The strength of the Consultative Assembly is the potential influence of its members in the parliaments to which the members of the Committee of Ministers are responsible, a factor which does not exist in any other international organization. When claiming to act as a co-ordinating body for all forms of Western

¹ See Margaret Ball, 'The Organization of American States and the Council of Europe', in this *Year Book*, 26 (1949), pp. 150-76; *The Inter-American Juridical Yearbook*, 1948 and 1949; Kunz, 'The Bogotá Charter of the Organization of American States', in *American Journal of International Law*, 42 (1948), pp. 568-89; and *Annals of the Organization of American States*.

² For which see Margaret Ball, *The Problem of Inter-American Organization*; Humphrey, *The Inter-American System—A Canadian View*.

³ Cf. Margaret Ball, 'The Organization of American States and the Council of Europe', in this *Year Book*, 26 (1949), pp. 150-76; see also Council of Europe, Consultative Assembly, *Official Reports of Debates and Documents*.

European regional co-operation, including co-operation in respect of matters entrusted previously to other bodies, the Consultative Assembly relies on its inter-parliamentary character as justifying its claim to review the action of inter-governmental bodies.

47. It seems probable that a number of European specialized authorities will be gradually created. The first plan for such an authority to assume a definite form, the Schuman Plan for the constitution of a European Coal and Steel Community,¹ is based on novel principles. In other parts of the world the development of regional organization is at an earlier stage than in the Americas and Europe, but in the Middle Eastern area in particular it seems likely to develop farther in the near future.

48. While regional sentiment and loyalties have grown stronger in a period of general political strain, their roots are deeper; they are the expression of attitudes which have developed as the result of the interaction of European and extra-European political forces during the last five centuries. In these circumstances it is inevitable that they should be a major force in determining the present structure of international organization. They are, however, potentially disruptive forces; it is therefore important that they should find expression within a general world framework. Moreover, many problems which have a regional aspect are not primarily regional and both international and regional effort are likely to be frustrated unless they are so directed as to reinforce each other. In all of the regions there are important extra-regional political and economic cross-currents. The co-existence of the independent regional organizations and the regional instrumentalities and activities of the United Nations and the specialized agencies reflects this complex situation.

49. It is for these reasons that the relationships between the United Nations and the specialized agencies on the one hand and the regional organizations on the other present the most serious of all the problems of co-ordination. The political factors which dominate these relationships are a reflection of the extent to which political harmony is achieved or lacking within the United Nations itself. The resulting problems are made more intractable by the manner in which they are coloured by regional sentiment and aspirations and the difficulty of framing any objective criteria for determining the appropriate scope of regional as contrasted with international action. A further complication is that neither the General Assembly nor the Economic and Social Council has any specific attributions in relation to regional bodies under the Charter and that, although certain tentative steps have recently been envisaged, there is still no administrative machinery

¹ See, for instance, Kaeckenbeeck, 'The International Authority of the Ruhr and the Schuman Plan', in *Transactions of the Grotius Society*, vol. 37 (1951), Van Raalte, 'The European Coal and Steel Community: A Dutch View', in *International and Comparative Law Quarterly*, 1, pp. 73-85.

for handling relations with them comparable to that which exists within the United Nations system.

50. Only in the light of this historical and political background can the complexities of the present structure of international organization be fully understood, or the problems of its future development be seen in true perspective. These complexities are the outcome of the historical and political forces which have moulded the development of international organizations in the present-day world; they cannot be lightly dismissed as illogical or inconvenient; they are essential elements in the contemporary problem of international organization.

51. It is in the light of this historical and political background and of the broad considerations of policy which have been reviewed that legal and institutional devices designed to secure more effective co-ordination must be tested. We shall turn now to an introductory survey of the legal and institutional devices which have been adopted for that purpose.

III. THE LEGAL FOUNDATIONS OF CO-ORDINATION

52. The legal relationships between the United Nations and the other international organizations are governed primarily by the relevant provisions of the Charter of the United Nations and of the constituent instruments of the other organizations, and by the relationship and other inter-organizational agreements concluded in pursuance of these provisions. The United Nations and the other organizations all derive their powers from independent grants of authority from their Members contained in their own constituent instruments, but in drafting these instruments the importance of co-ordination has been a leading preoccupation and most of them provide for the regulation of inter-organizational relationships by agreements. The importance which has now been assumed by such agreements as a necessary complement to the various constituent instruments is of far-reaching consequence for the general development of international law and of the basic structure of international organization.¹ It is these instruments and agreements taken together which now constitute the fundamental law of inter-organizational relationships. They are supplemented by the rules of procedure of the various organs of the United Nations and the other organizations and by a number of miscellaneous instruments and regulations. All of these texts must naturally be interpreted and applied in the context of customary international law, the general principles of law recognized by civilized nations, and such rules and understandings of inter-organizational constitutional practice as may from time to time harden into law.

¹ Cf. Parry, 'The Treaty-making Power of the United Nations', in this *Year Book*, 26 (1949), pp. 108-49.

The Charter of the United Nations

53. The Charter embodies a considered scheme for the co-ordination of the activities of the United Nations and the specialized agencies. It sets forth the economic and social purposes which the United Nations is to promote, embodies a pledge by all Members to take joint and separate action in co-operation with the Organization for the achievement of these purposes,¹ and provides that the various specialized agencies shall be brought into relationship with the United Nations,² which is to make recommendations for the co-ordination of their policies and activities.³

54. The Economic and Social Council may enter into agreements with any of the specialized agencies defining the terms on which the agency concerned shall be brought into relationship with the United Nations; such agreements are subject to approval by the General Assembly.⁴ It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.⁵ It is authorized to take appropriate steps to obtain regular reports from the specialized agencies; may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence which are made by the General Assembly; and may communicate its observations on these reports to the General Assembly.⁶

55. The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.⁷

56. This scheme has two leading features. On the one hand the relationship of the specialized agencies to the United Nations is to be determined by agreement and the co-ordinating function of the United Nations is to be exercised by means of consultation and recommendations and not by means of any overriding authority. On the other hand no clear distinction is drawn in the Charter between the promotional and the co-ordinating functions of the United Nations. The provisions conferring and defining these functions are so arranged that in reading the relevant chapters of the Charter one passes constantly from the one function to the other. This absence of any clear distinction between two essentially different functions

¹ Article 56.

³ Article 58.

⁵ Article 63 (2).

⁷ Article 70.

² Article 57.

⁴ Article 63 (1).

⁶ Article 64.

has perhaps contributed to some of the difficulties which have been encountered in the practical application of some of the provisions of the Charter.

57. The specialized agencies are also mentioned in other chapters of the Charter in connexion with budgetary and financial arrangements, decisions of the Security Council, the functioning of the Trusteeship Council, and the advisory jurisdiction of the International Court of Justice.

58. In addition to providing that the General Assembly shall consider and approve the budget of the United Nations,¹ and that the expenses of the United Nations shall be borne by the Members as apportioned by the General Assembly,² the Charter empowers the General Assembly to 'consider and approve any financial and budgetary arrangements with specialised agencies' and 'to examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned'.³ It will be observed that the provision contemplates two alternative types of budgetary arrangements: arrangements, based on agreement in appropriate cases, which may involve conferring on the General Assembly responsibility for voting the budget of a specialized agency; and a minimum degree of relationship which merely authorizes the General Assembly to examine the administrative budget of the agency and make recommendations to the agency.

59. Decisions of the Security Council for the maintenance of international peace and security are to be 'carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are Members'.⁴ The obligation is, it will be observed, an obligation upon the Members of the United Nations which are Members of the agencies concerned; it neither is nor purports to be an obligation upon the agencies as such.

60. The Charter provides that the Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to the matters with which they are respectively concerned.⁵

61. The Charter provides that 'the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question';⁶ and that 'other organs of the United Nations and specialised agencies which may at any time be so authorised by the General Assembly may also request advisory opinions of the Court on legal questions arising within the scope of their activities'.⁷ This last provision is supplemented by provisions contained in the Statute of the

¹ Article 17 (1).

³ Article 17 (3).

⁵ Article 91.

⁷ Article 96 (2) of the Charter.

² Article 17 (2).

⁴ Article 48 (2).

⁶ Article 96 (1) of the Charter.

Court empowering the Court to give an advisory opinion 'on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request'¹ and providing for the notification of advisory proceedings to international organizations.²

62. In addition to these provisions which refer explicitly to or bear directly upon the position of the specialized agencies, a number of other provisions of the Charter, such as those relating to membership of the United Nations,³ the secretariat,⁴ the registration of treaties,⁵ and the legal capacity and immunities of the United Nations,⁶ have an indirect bearing on co-ordination problems and the position of the specialized agencies.⁷

63. The Charter, while dealing in the manner which we have described with the relationships between the United Nations and the specialized agencies, is silent on the subject of the relationships between the United Nations and other international organizations. Only agencies having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields are to be brought into relationship with the United Nations as specialized agencies. The report of the Committee of the San Francisco Conference responsible for framing Article 57 of the Charter indicates, however, that this article is not to be regarded as precluding the Economic and Social Council from 'negotiating at its discretion, subject to the approval of the General Assembly, agreements bringing other types of inter-governmental agencies into relationship with' the United Nations. Commenting on this report, the *Observations on Relationships with Specialised Agencies*,⁸ which were prepared by the Preparatory Commission of the United Nations for the guidance of the General Assembly and the Economic and Social Council, point out that 'accordingly, in addition to negotiating agreements with inter-governmental agencies which have wide international responsibilities, the Economic and Social Council may, at its discretion, negotiate agreements with the competent authorities, bringing into relationship such other inter-governmental agencies, including those of a regional character, as are not considered as being within the definition of Article 57 but which it is considered desirable to bring into relationship'.⁹

¹ Article 65 (1) of the Statute.

² Article 66 of the Statute; on the whole matter see Jenks, 'The Status of International Organizations in relation to the International Court of Justice', in *Transactions of the Grotius Society*, vol. 32 (1946), pp. 1-41.

³ Articles 3-6 of the Charter.

⁴ Articles 97-101 of the Charter.

⁵ Articles 104 and 105 of the Charter.

⁶ Article 102 of the Charter.

⁷ Concerning the extent to which Article 103 of the Charter may be relevant see Jenks, 'Co-ordination: A New Problem of International Organisation', paragraph 49.

⁸ *Report of the Preparatory Commission of the United Nations*, 1945, pp. 40-48.

⁹ Paragraph 2.

The Charter contains, of course, a special chapter dealing with regional arrangements,¹ but that chapter deals only with regional arrangements and agencies for the maintenance of international peace and security. It does not deal with the interrelationships between international and regional organizations operating in the economic and social fields.

The Constituent Instruments of the Specialized Agencies

64. The provisions of the Charter concerning the relations between the United Nations and other international organizations, while in some respects unique in character, are complemented by the corresponding provisions of the constituent instruments of the other organizations. Virtually all of these instruments contain some general provision concerning relations with other international organizations generally or with the United Nations specifically, and many of them contain provisions bearing on special aspects of the relationship between the United Nations and other organizations, including provisions relating to membership, budgetary arrangements, trust territories, treaty registration, common staff arrangements, assimilation in regard to immunities, and like matters. It follows that, while the specialized agencies and regional and other organizations draw their authority from powers granted directly to them by their Members in the constitutions, and are directly responsible to their Members for the discharge of the duties so entrusted to them, the constitutions governing them, while having an independent validity, envisage their functioning to a greater or lesser extent as parts of a wider structure.

65. There are wide variations in the provisions of this type contained in the constitutions of the various specialized agencies.² The Articles of Agreement of the Fund³ and the Bank,⁴ which took final shape at Bretton Woods before the Dumbarton Oaks conversations, provide for the most tenuous links, partly because of the date of their adoption, partly because of the nature of the responsibilities entrusted to the Fund and the Bank. The relevant provisions of the International Civil Aviation Convention⁵ are also very general in character and likewise bear the stamp of having been drafted before the San Francisco Conference. The F.A.O. Constitution, on the other hand, while also drafted before the San Francisco Conference,⁶

¹ Articles 52-54.

² For a fuller survey see Jenks, 'Co-ordination: A New Problem of International Organisation', paragraphs 51-61.

³ Article X; for the text of the Fund Agreement see this *Year Book*, 23 (1946), pp. 433-57, or *United Nations Treaty Series*, vol. ii, pp. 39-133.

⁴ Article V, Section 8; for the text of the Bank Agreement see this *Year Book*, 24 (1947), at pp. 462-80, or *United Nations Treaty Series*, vol. ii, pp. 134-205.

⁵ Articles 64, 65, and 93. For the text of the relevant parts of the Convention see this *Year Book*, 23 (1946), pp. 460-5; for the full text see *United Nations Treaty Series*, vol. xv, pp. 295 ff.

⁶ For the preoccupations of its draftsmen, see *First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture*, available in British Parliamentary

represents a sharply contrasted approach; it was the F.A.O. Constitution which introduced for the first time a number of pioneer devices which have since been widely copied in the Constitutions of other organizations, including provision for the participation of representatives of other organizations in F.A.O. proceedings, and for agreements with other organizations defining the distribution of responsibilities and methods of co-operation. The nature of the links with the United Nations and with other international organizations provided for in the Constitution of the I.L.O., as amended in 1945 and 1946, is to be explained by historical factors of a special character, the outcome of which was that the I.L.O., when amending its Constitution, proceeded upon two essential principles: firstly, that the I.L.O. will, in the interest of the effectiveness of its own work, co-operate fully in any general arrangements for international co-operation, and secondly, that the Constitution should make it possible for the I.L.O. to operate autonomously whenever necessary and should not embody any restrictions upon its operational autonomy which might be a source of embarrassment in some unpredictable future political conjuncture.¹ The I.L.O. Constitution accordingly contains pledges of the fullest co-operation with other international organizations and gives the I.L.O. all the powers necessary for this purpose, but the references to the United Nations are primarily permissive rather than mandatory in character. The constituent instruments of U.N.E.S.C.O.,² W.H.O.,³ I.M.C.O.,⁴ and W.M.O.,⁵ on the other hand, were all framed after the San Francisco Conference with a view to creating organizations designed to be brought into relationship with the United Nations as specialized agencies in pursuance of the Charter. It is therefore natural that these instruments should leave less discretion to the organizations concerned in regard to their relations with the United Nations; all of them provide in terms that the organization created thereby shall be brought into relationship with the United Nations in pursuance of Articles 57 and 63 of the Charter and contain detailed references to the relations of the organizations created by them with the United Nations and other specialized agencies over a wide range of subjects. The Universal

Paper Cmd. 6590 of 1945. For the original text of the Constitution see this *Year Book*, 23 (1946), pp. 416-21; for the amendments adopted in 1946 see *ibid.* 26 (1949), pp. 506-7.

¹ See particularly 'Report of the Conference Delegation on Constitutional Questions', in *International Labour Conference, 29th Session, Montreal, 1946*, Report II (1), especially pp. 17-34; cf. also *International Labour Conference, 26th Session, Philadelphia, 1944*, Report I, 'Future Policy, Programme and Status of the International Labour Organisation'; for the text of the Constitution as amended in 1946 see this *Year Book*, 24 (1947), pp. 433-46, or *United Nations Treaty Series*, vol. xv, pp. 35-122.

² For the text of the U.N.E.S.C.O. Constitution see this *Year Book*, 23 (1946), pp. 424-9, or *United Nations Treaty Series*, vol. iv, pp. 275-301.

³ For the text of the W.H.O. Constitution see this *Year Book*, 24 (1947), pp. 451-62, or *United Nations Treaty Series*, vol. xiv, pp. 185-203.

⁴ For the text of the I.M.C.O. Convention see this *Year Book*, 25 (1948), pp. 447-57.

⁵ For the text of the W.M.O. Convention see this *Year Book*, 26 (1949), pp. 498-506.

Postal Convention¹ and the International Telecommunication Convention² form a class apart. Both are older instruments which, together with their annexes, subsidiary agreements, and detailed regulations, are partly constituent instruments of the Postal and Telecommunication Unions and partly codes of postal and telecommunication regulations. Both were amended in 1947 and in both cases a new article was introduced in the Convention providing that the Union will be brought into relationship with the United Nations in accordance with the terms of an agreement annexed to the Convention. Although these agreements are simpler than the standard type of agreement and in some respects involve less far-reaching obligations, we have the strange paradox that two of the oldest and most independent of the specialized agencies are the only ones bound to the terms of particular agreements with the United Nations by the provisions of their own constituent instruments.

66. In brief, while the provisions concerning relationships with other international organizations contained in the constituent instruments of the specialized agencies vary as widely as the circumstances which have given rise to them, all of the specialized agencies have been designed to play a part in a co-operative scheme of world organization, and all of their constituent instruments lay the necessary constitutional foundation for their participation in such a scheme.

The Constituent Instruments of the Regional Organizations

67. There is also great variety in the provisions concerning relations with the United Nations contained in the constituent instruments of the regional organizations.

The Charter of the Organization of American States

68. The O.A.S. Charter³ reaffirms the principles and purposes of the United Nations, provides that within the United Nations O.A.S. is a regional agency,⁴ proclaims certain essential purposes of O.A.S. 'in order to put into practice the principles on which it is founded and to fulfil its regional obligations under the Charter of the United Nations',⁵ and provides in terms that none of its provisions is to be construed as impairing the rights and obligations of the Member states under the Charter of the United Nations.⁶ The detailed provisions of the O.A.S. Charter and of the instruments supplementary to it specifically provide in a series of different

¹ For the relevant part of the text see this *Year Book*, 25 (1948), pp. 465-72; for the full text of the Convention see *Yearbook of the United Nations*, 1947-1948, pp. 893-906.

² For the text of the International Telecommunication Convention and the relevant annexes see *Yearbook of the United Nations*, 1947-1948, pp. 932-54.

³ Preamble; for the text see *Inter-American Juridical Yearbook*, 1948, pp. 296-311.

⁴ Article 1.

⁵ Article 4.

⁶ Article 103.

contexts for co-operative relations with the United Nations.¹ While it would be premature to attempt to pass any judgment on the practical effect of these provisions, the general structure for which they provide is based to a considerable extent on the premiss that regional organizations are to be regarded as regional agencies within the United Nations system.

69. The O.A.S. Charter also embodies arrangements for bringing inter-American specialized organizations into relationship with the O.A.S. It provides that the specialized agencies shall establish co-operative relations with world agencies of the same character in order to co-ordinate their activities, and that in concluding agreements with international agencies of a world-wide character the inter-American specialized organizations shall preserve their identity and their status as integral parts of the O.A.S., even when they perform regional functions of international agencies.²

European and North Atlantic arrangements

70. The European and North Atlantic regional organizations, while intended to operate within the general framework of the United Nations, were, not unnaturally in view of the time and political circumstances of their creation and the experimental and novel bases on which some of them are organized, not conceived in the same manner as regional agencies of the United Nations system,³ and the references to the United Nations and other international organizations contained in their constituent instruments, without being less important than those contained in the Bogotá instruments, provide less elaborate arrangements for co-operation. The relevant provisions of the constituent instruments of the different European and North Atlantic organizations also present interesting contrasts with one another. In the case of all of these organizations the problem of their relationships with the United Nations and the specialized agencies has hitherto been less important than that of their relationships with each other—a problem which differences of membership have made particularly difficult.

The Convention for European Economic Co-operation

71. The Convention for European Economic Co-operation of 16 April 1948⁴ recites that a strong and prosperous European economy is essential for the attainment of the purposes of the United Nations⁵ and provides that O.E.E.C. shall establish such formal or informal relationships with the United Nations, its principal organs and subsidiary bodies, and with

¹ E.g. Articles 20, 53 (e), 60, and 110.

² Article 100.

³ See Beckett, *The North Atlantic Treaty, the Brussels Treaty, and the Charter of the United Nations* (1950), p. 34.

⁴ For the text of the Convention see Cmd. 7388 of 1948.

⁵ Preamble.

the specialized agencies as may best facilitate collaboration in the achievement of their respective aims;¹ the relationships established with the United Nations and the specialized agencies have been informal in character, but the relations between O.E.E.C. and the Council of Europe are now governed by a statement approved by the Committee of Ministers of the Council of Europe and the Council of O.E.E.C. which is equivalent to an inter-agency agreement.

The Statute of the Council of Europe

72. The Statute of the Council of Europe² neither defines nor provides any procedure for defining the relationship between the Council and other international organizations, but specifies that participation in the Council shall not affect the collaboration of its Members in the work of the United Nations and of other international organizations or unions to which they are parties,³ and provides that in taking decisions concerning the agenda of the Consultative Assembly, the Committee of Ministers is to have regard to the work of other European inter-governmental organizations to which some or all of the Members of the Council are parties;⁴ this last clause was designed primarily to avoid duplication of activities between the Council and O.E.E.C. Proposals to amend the Statute to empower the Committee of Ministers to conclude agreements with other organizations were abandoned as unnecessary in 1951 and the Committee placed on record an interpretation of its powers, specifying that it may, on behalf of the Council of Europe, conclude with any inter-governmental organization agreements on matters which are within the competence of the Council;⁵ although this interpretation mentions only European inter-governmental organizations, the Committee of Ministers appears to regard the authority recorded in it as applying also to agreements with international organizations.

73. The Committee of Ministers has also adopted a text⁶ defining its policy in relation to the creation of specialized authorities and the manner

¹ Article 20 (A).

² For the text of the Statute see Cmd. 7686 of 1949 and for amendments thereto Cmd. 8293 of 1951.

³ Article 1 (c).

⁴ Article 33.

⁵ See Council of Europe Consultative Assembly, Third Ordinary Session, First Part, *Documents*, Part II, pp. 323-6.

⁶ For the text see Council of Europe Consultative Assembly, Third Session, First Part, May 1951, *Documents*, Part II, pp. 316-17. Such authorities may be created on the initiative of the Council of Europe or of Member states. The Committee of Ministers may invite each specialized authority to submit to it a periodical report on its activities; in so far as any agreement setting up a specialized authority provides for a parliamentary body, this body may be invited to submit a periodical report to the Consultative Assembly of the Council of Europe. The conditions under which a specialized authority shall be brought into relationship with the Council may be determined by special agreements concluded between the Council and the specialized authority concerned. Such agreements are to be negotiated and concluded on behalf of the Council of Europe by the Committee of Ministers after an opinion has been given by the Consultative Assembly.

to which they should be brought into relationship with the Council of Europe.

The European Coal and Steel Community

74. The Treaty constituting the European Coal and Steel Community is the first constituent instrument of a European specialized authority. It provides that the High Authority of the Community will maintain whatever relationships appear useful with the United Nations and the O.E.E.C. and will keep these organizations regularly informed of the activity of the Community.¹ The relations between the Community and the Council of Europe are governed by a special protocol annexed to the Treaty.²

The North Atlantic Treaty

75. The parties to the North Atlantic Treaty³ reaffirm their faith in the purposes and principles of the Charter⁴ and undertake, as set forth in the Charter, to settle disputes by peaceful means and refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.⁵ They undertake to contribute towards the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being; and agree that they will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.⁶ They also undertake to maintain and develop their individual and collective capacity to resist armed attack and agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and that if such an attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter, will assist

¹ Article 93.

² Article 94. This protocol invites the governments of the Member states to recommend to their respective parliaments that the members of the Assembly of the Community which these parliaments are called upon to designate should preferably be chosen from among the representatives in the Consultative Assembly of the Council of Europe (Article 1). The Assembly of the Community is to forward annually to the Consultative Assembly of the Council of Europe a report on its activity (Article 2) and the High Authority is to communicate its general annual report to the Committee of Ministers and Consultative Assembly of the Council of Europe (Article 3). The High Authority is to inform the Council of Europe of the action which it has been able to take on any recommendations which the Committee of Ministers of the Council of Europe may have addressed to it (Article 4). Agreements between the Community and the Council of Europe may, among other things, provide for any other type of mutual assistance and collaboration between the two organizations and the appropriate forms thereof (Article 6).

³ For the text of the Treaty see Cmd. 7657 of 1949 or *United Nations Treaty Series*, vol. xxxiv, pp. 243-55.

⁴ Preamble.

⁵ Article 1.

⁶ Article 2.

the attacked party or parties; any such attack and all measures taken as a result thereof are to be reported to the Security Council and terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.¹ The Treaty specifies that it does not affect, and is not to be interpreted as affecting in any way, the rights and obligations under the Charter of the parties which are Members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.² There is no reference in the Treaty to the relationship between the economic collaboration for which it provides and the activities of other international organizations, but the communiqué issued after the Fourth Session of the North Atlantic Council indicates that the Council, in considering what further action should be taken under the provision, will take into account the work of existing agencies in this field.³ In the initial stages the N.A.T.O. was concerned primarily with questions of economic policy immediately related to defence requirements rather than with more general questions of long-range economic and social policy, but more recently there has been a growing insistence that its economic and social work should be greatly developed as a contribution to the development of a North Atlantic Community. As this tendency develops, the need for a closer relationship with other organizations will become increasingly acute, but it is not unnatural that in the early stages of its work the N.A.T.O. should have been more concerned with perfecting its own organization than with developing its relations with other bodies. It is in regard to a security question, that of relations between the N.A.T.O. and the proposed European Defence Community, that the matter has first become acute, and it now appears to be the intention to define these relations by a protocol annexed to the Treaty constituting the European Defence Community, the terms of which have been approved by the North Atlantic Council.

Constituent instruments of other regional bodies

76. The Constitution of the Council for Technical Co-operation in South and South-East Asia,⁴ the Covenant of the League of Arab States,⁵ the Agreement for the Establishment of the Caribbean Commission,⁶ the Agreement establishing the South Pacific Commission,⁷ and the Constitution of the Commission for Technical Co-operation in Africa South of the

¹ Article 5.

² Article 7.

³ For this text see Cmd. 7977 Miscellaneous No. 10 (1950), Part 2, III (e), at p. 12.

⁴ For this text see Cmd. 8080 of 1950, Appendix VII.

⁵ Articles III and XIV. For the text see Royal Institute of International Affairs, *Documents on Regional Organizations outside Western Europe, 1940-1949*, pp. 13-19.

⁶ Article 18. For the text see *International Organization*, 1 (1947), pp. 251-6.

⁷ Article 15. For the text see *ibid.*, pp. 419-28.

Sahara all contain provisions of these varied types concerning the relations between these bodies and the United Nations and the specialized agencies.¹

77. It is apparent at a glance that, with the exception of the Charter of the O.A.S., the constituent instruments of the regional organizations make no attempt to create a clear-cut and tidy relationship between these organizations and the United Nations. They bear the stamp of widely varying political considerations and backgrounds and, in general, deal only with those aspects of the problem of relations with the United Nations and the specialized agencies which are of immediate importance in the case of the organizations concerned. In the case of the West European and North Atlantic instruments, the mutual relations of the various West European and North Atlantic organizations have created problems of a more acute and immediate character than their relations with the United Nations and the specialized agencies and have therefore received a larger and increasing measure of attention. But all these instruments bear impressive testimony to the extent to which the problem of relations with other organizations has been present to the minds of those responsible for them. The establishment of closer links in the future and satisfactory working arrangements for day-to-day co-operation both within regions and between regional and international organizations are of primary importance for effective overall co-ordination, but the main problems to be solved in order to permit of such developments are essentially reflections of the various elements in the present political tension and particularly of the East-West conflict, the divergent policies of the North Atlantic alliance and the remaining neutrals, controversies concerning the pace and method of political development in non-self-governing territories, and the differences between the highly industrialized and the under-developed countries. While the constituent instruments of the regional organizations might and doubtless would have contained more far-reaching provisions if these political factors in the situation had been less prominent, they all accept the basic premiss that the organizations created by them are designed as buttresses to a universal system. It is reasonable to hope that on the basis of this premiss effective co-ordination can be progressively developed as political conditions allow.

The relationship and other inter-organizational agreements

78. We have observed that the United Nations, the specialized agencies, the regional organizations, and the other inter-governmental bodies all derive their powers from independent grants of authority from their

¹ For an analysis of these provisions see Jenks, 'Co-ordination: A New Problem of International Organisation', paragraphs 72-76. The Constitution and By-Laws of the International Islamic Economic Organization do not contain any similar provisions, but the 1950 Teheran Conference of the Organization envisaged the possibility of its recognition by international agencies as an Economic Commission for the Muslim Countries.

Members, but that the Charter of the United Nations provides a general framework for the co-ordination of their activities and that the constituent instruments of virtually all the other organizations, including both the specialized agencies and most of the regional organizations, contain provisions varying widely in character which complement these provisions of the Charter and frequently provide expressly both for agreements with the United Nations, such as are contemplated by the Charter in the case of specialized agencies, and for agreements with other international organizations. These agreements constitute the third essential element in the fundamental law of inter-organizational relationships. Their rapid development during the last few years is a new factor in the development of both international organization and international law. There are a number of different types of agreement, each of which presents distinctive problems, the more important types being the relationship agreements between the United Nations and the specialized agencies, inter-specialized agency agreements within the United Nations system, agreements between specialized agencies and emergency agencies of the United Nations, agreements between specialized agencies and regional organizations, relationship agreements within the inter-American system, and inter-organizational arrangements within the West European and North Atlantic system. All of these agreements may be regarded as being governed by the applicable principles of the law of treaties, supplemented by the general principles of the law of contract.

The relationship agreements between the United Nations and the specialized agencies

79. Relationship agreements concluded in pursuance of the Charter are now in force between the United Nations and ten specialized agencies, namely, the I.L.O., U.N.E.S.C.O., F.A.O., I.C.A.O., the Fund, the Bank, W.H.O., the U.P.U., I.T.U., and W.M.O.¹ The first of these agreements to be concluded was that between the United Nations and the I.L.O., which has to a large extent served as a model for subsequent agreements, but variants to meet special situations are to be found in all of the agreements. The agreements with the Fund and the Bank are of a special character and there are important departures from the normal pattern in the U.P.U. and I.T.U. agreements.²

¹ Further agreements have been negotiated with the I.M.C.O. Preparatory Commission and the I.T.O. Interim Commission but are not yet in force and the second may be regarded as having lapsed. An agreement between the United Nations and I.R.O. has lapsed with the dissolution of I.R.O.

² A detailed study of the history of the agreements with an analysis of them by articles and an account of their implementation will be found in *Report of Action taken in Pursuance of the Agreements between the United Nations and the Specialised Agencies* (United Nations, Economic and Social Council, *Official Records: Fourth Year, Ninth Session, Report of the Secretary-General*

80. The standard type of agreement consists of provisions concerning the status and competence of the specialized agency, reciprocal representation, the proposal of agenda items, recommendations by the United Nations, the exchange of information and documents, reports by agencies to the United Nations, assistance to the Security Council and the Trusteeship Council, non-self-governing territories, relations with the International Court of Justice, personnel arrangements, statistical services, administrative and technical services, the registration of official documents, budgetary and financial arrangements, inter-agency agreements and agreements with non-governmental organizations, liaison arrangements and regional activities, implementation of the agreement, entry into force, and validity and revision. A full study of the agreements lies outside the scope of this introductory survey, in which it must suffice to mention briefly some salient features of the arrangements for co-operation provided for in them.¹

Recognition of the competence of the specialized agencies

81. All of the agreements recognize the status and competence as a specialized agency of the organization concluding the agreement with the United Nations; the Fund and Bank agreements each provide that the Fund (or Bank) is a specialized agency which, by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, is, and is required to function as, an independent international organization. The Governing Body of the I.L.O. has pointed out that, from the standpoint of the I.L.O., this recognition is the foundation of the agreement and was understood to imply that the United Nations would not assume direct responsibility for matters falling within the sphere of action of the I.L.O.

Reciprocal representation

82. All of the agreements contain provisions for reciprocal representation based on Article 70 of the Charter, but whereas that article provides for such representation only in the Economic and Social Council, the agreements extend the principle in a somewhat modified form to the General Assembly and the Trusteeship Council. The reciprocal representation provisions of the agreements have been widely used and have introduced an entirely new element into the composition of official international bodies, namely, representatives of other international organizations whose function

on action taken in pursuance of the agreements between the United Nations and the specialised agencies, 31 May 1949 (E/1317), issued by the Secretary-General after consultation with the executive heads of the specialized agencies on 31 May 1949 in response to the Resolutions adopted by the General Assembly. Cf. also Sharp, 'The United Nations and the Specialised Agencies—Progress Report', in *International Organization*, 1 (1947), pp. 460–74, and 2 (1948), pp. 247–67.

¹ For a fuller discussion of the Agreements see Jenks, 'Co-ordination: A New Problem of International Organisation', paragraphs 79–120.

is to endeavour through their participation to promote fuller co-ordination of the activities of the various organizations. While the quality of the representation which has been possible has necessarily been uneven during the early years of the development of the system, great progress has been made and the foundations laid for a new technique for the development of inter-agency relationships.

Recommendations by the United Nations

83. The Charter contemplates that the co-ordinating functions of the Economic and Social Council will be exercised primarily by means of recommendations to the specialized agencies, the General Assembly, and the Members of the United Nations. The provisions concerning such recommendations contained in the agreements are therefore potentially of outstanding importance. While little use has been made of these clauses hitherto, since the Council has preferred to make suggestions less formally in resolutions or reports rather than to make formal recommendations within the meaning of the Charter and the agreements, they have lost none of their importance as an essential feature of the general policy of the Charter and the agreements, and may prove to be of increasing practical significance as the arrangements for co-ordination are further developed.

Exchange of information and documents, and reports by agencies to the United Nations

84. The provisions concerning the exchange of information and documents and the provisions of reports by agencies have proved to be among the most useful clauses of the agreements. The agreements are designed to promote co-ordination by means of consultation and recommendations and a full and prompt exchange of information in the formative stages of policy is of primary importance for the purpose. The annual reports by agencies, which are provided for in the Charter, give the Economic and Social Council an opportunity to review regularly the work of each agency in its relationship to the overall picture.

Personnel arrangements

85. All of the agreements, except those with the Fund, the Bank, U.P.U., and I.T.U., contain provisions whereby, with slight variations of language, the parties recognize that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination and agree to co-operate in various ways with this end in view.¹ The Fund, Bank, U.P.U., and I.T.U. agreements

¹ Cf. Jenks, 'Some Problems of an International Civil Service', in *Public Administration Review*, 3 (1943), pp. 93-105.

contain provisions for consultation on personnel and other administrative matters of mutual interest with a view to securing as much uniformity in these matters as is practicable. These clauses of the agreements have already had far-reaching results and important steps towards greater uniformity have been taken by decisions taken by the United Nations and the specialized agencies after consultation through the Administrative Committee on Co-ordination. *Ad. Committee on Co-ordination*

Budgetary and financial arrangements

86. All of the agreements contain provisions based on paragraph 3 of Article 17 of the Charter, which provides that the General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

87. The Fund and Bank Agreements simply provide that the annual reports and quarterly financial statements of the agencies will be furnished to the United Nations, which agrees that in the interpretation of paragraph 3 of Article 17 of the Charter it will take into consideration that the Fund and Bank do not rely for their annual budgets upon contributions from Members and that the appropriate authorities of the Fund and Bank enjoy full autonomy in deciding the form and content of these budgets. The U.P.U. Agreement provides that the annual budget of the Union (which is relatively small and stable) shall be transmitted to the United Nations and that the General Assembly may make recommendations thereon to the Congress of the Union; the I.T.U. Agreement contains substantially the same provisions.

88. All of the other agreements contain complex provisions on budgetary and financial questions which are subject to a number of variations. On the basis of these provisions a substantial measure of co-ordination and uniformity of financial and administrative practice has been secured by decisions taken by the United Nations and the agencies after consultation through the Administrative Committee on Co-ordination and in the light of the advice of the Advisory Committee on Administrative and Budgetary Questions of the General Assembly.

89. The complex article contains a number of variants of a clause concerning the possible inclusion of the budgets of specialized agencies within a consolidated general budget of the United Nations on the basis of a supplementary agreement. In pursuance of these provisions, prolonged and thorough consultations have taken place through the A.C.C. which has reached the conclusion, subsequently concurred in by the Economic and Social Council, the Advisory Committee on Administrative and Budgetary

Questions of the General Assembly, and the General Assembly itself, that the constitutional, political, and administrative difficulties which the submission of the agencies' budgets to the General Assembly for approval would involve are at the present time insuperable. In these circumstances the A.C.C. came to the unanimous conclusion that a consolidated budget to be approved by the General Assembly, however desirable it might perhaps be as a development of international institutions, is not immediately practicable, and that in these circumstances the collective experience and efforts of the United Nations and the agencies can more profitably be directed to the development of alternative methods and techniques of co-ordination, and in particular to the improvement and strengthening of the process of review and examination of budgets by the Advisory Committee and by the General Assembly. This conclusion was accepted by the General Assembly. Along these other lines of approach substantial progress has been and continues to be made.¹

Validity and revision

90. All of the agreements, except those with the Fund and the Bank, have been conceived as a long-term settlement of the relations between the United Nations and the agencies concerned, subject to revision by mutual agreement but not subject to unilateral modification. The Fund and Bank agreements are terminable on six months' written notice. The termination of the other agreements by the disappearance of a party, a vital change in circumstances, or the failure of the other party to perform an essential condition of the agreement would presumably be governed by general principles of law.

91. In a report to the General Assembly the Secretary-General has expressed the view that 'good general co-ordinated action is the aggregate of hundreds of points of contact between the United Nations and the agencies and between the agencies themselves'. The main significance of the relationship agreements is that they provide a framework within which such points of contact develop constantly and can be consistently utilized to secure effective co-ordination of policy and action. There has naturally been a certain amount of criticism of the agreements, much of it largely theoretical in character. Certainly it is true that they are not models of neat drafting or logical precision and that some of the variations from one text to another are unnecessary and confusing. Many of the criticisms which have been advanced, however, cancel each other out. Some take the view that they leave too large a measure of autonomy to the specialized

¹ For fuller particulars see 'Co-ordination: A New Problem of International Organisation', paragraphs 101-9.

agencies and make too little provision for centralized control, or at least supervision, of both policy and finance—a view which largely ignores the fundamental principles on which the new framework of international organization was deliberately and systematically built. Others take the view that they are too rigid and legalistic in character and that it would have been wiser to leave the relationships between the United Nations and the specialized agencies to develop primarily on the basis of customary understandings—a view which also largely ignores the provisions for bringing the specialized agencies into relationship with the United Nations by agreements contained in the Charter. It is significant that the view reached by the Secretary-General and the executive heads of the specialized agencies after mature consideration that the agreements afford both a satisfactory and indeed the only possible basis for generally acceptable working arrangements has not been seriously challenged in the General Assembly, the Economic and Social Council, or the governing bodies of the specialized agencies. The extent to which the agreements have won acceptance from those who are called upon to work them affords substantial proof that they are well adapted to the needs and possibilities of the current situation.

Inter-agency agreements within the United Nations system

92. In addition to the relationship agreements concluded in pursuance of Article 63 of the Charter and the complementary provisions of the Constitutions of the various specialized agencies, there are a number of other inter-organizational agreements.

93. The specialized agencies in the social group, that is to say, I.L.O., F.A.O., U.N.E.S.C.O., and W.H.O., all have agreements with each other which follow with variations the model of the first of these agreements to be concluded, namely, the I.L.O.-F.A.O. agreement.¹ In framing this agreement great care was taken to emphasize throughout its provisions that it was concluded within the general framework established by the Charter. The gist of the Agreement is to be found in the undertaking contained in the first article that the two organizations will act in close co-operation with each other and will consult each other regularly in regard to matters of common interest. There are also provisions concerning reciprocal representation, joint committees, the exchange of information and documents, personnel arrangements, and statistical services. These agreements are essentially treaties of amity and goodwill, mainly concerned with the formal structure of the mutual relations between the participating organiza-

¹ For the text see *First Report of the International Labour Organisation to the United Nations*, vol. ii, pp. 393-6.

tions, which leave the outstanding practical problems to be solved in the course of time on the basis of the cordial mutual relations for which they provide. As such they have played a useful role during the formative stages in the development of inter-agency relationships but they were always intended to be supplemented by working understandings dealing with such concrete issues as may from time to time become ripe for mutual agreement.¹

94. In some respects the inter-specialized-agency agreements have presented fewer problems than any other type of inter-organizational agreement, primarily because the mutual relationships of the specialized agencies have given rise to surprisingly little difficulty in practice. The problems which they present are partly frontier problems, partly problems of devising methods of joint action which are operationally effective without impairing the constitutional responsibility of the executive head of each agency to his own governing body and conference or equivalent bodies. In regulating their mutual relationships the specialized agencies speak the same language with each other; though their interests and policies may come into conflict at certain points, their problems and preoccupations are in general much the same and differences of view can usually be resolved by agreement. In view of the extent to which the spheres of competence of the different agencies as defined in the respective constitutions potentially overlap and reflect national jurisdictional controversies, the success with which jurisdictional difficulties have been overcome internationally with a minimum of formal definition of spheres of competence is a tribute to the good sense of all concerned.

95. In a few cases formal agreements have been concluded between specialized agencies and emergency agencies of the United Nations;² the principles which should govern the relationships between specialized agencies and emergency agencies of the United Nations are at present under

¹ Such agreements cover only a small part of existing inter-agency relationships. The Fund and the Bank work in the closest relationship with each other and provisions concerning their relationship are contained in their respective by-laws, but their relations are based on their common origin at Bretton Woods, the habit of holding joint sessions of their Boards of Governors, and the close inter-secretariat co-operation required for their daily work and facilitated by their sharing common premises, and they have no formal inter-agency agreement. I.C.A.O., U.P.U., I.T.U., and W.H.O. have close working relations but these are not based on inter-agency agreements.

² There is, for instance, such an agreement between W.H.O. and the United Nations Relief and Works Agency for Palestine Refugees in the Near East, which provides that W.H.O. will plan a medical programme to be administered by the Agency as an integral part of the general programme under the technical direction of a Chief Medical Officer appointed by W.H.O. in agreement with the Agency. The relations between W.H.O. and U.N.I.C.E.F. are governed by the equivalent of a similar agreement which takes the form of agreed principles governing their co-operative relationship framed by a joint committee and approved by the Executive Boards of the two Agencies. The relations between two of the emergency agencies of the United Nations, namely, U.N.R.W.A.P.N.E. and U.N.I.C.E.F., are governed by an exchange of letters equivalent to an inter-agency agreement.

consideration by the A.C.C., the conclusions reached by which will doubtless be reflected in future agreements.

Agreements between specialized agencies and regional organizations

96. Another group of agreements of particular interest and importance consists of the agreements concluded and in process of negotiation between specialized agencies and regional organizations.

97. The I.L.O. and U.N.E.S.C.O. have concluded general agreements with the O.A.S., and U.N.E.S.C.O. has concluded a supplementary agreement concerning fundamental education; the W.H.O. has concluded an agreement with the P.S.O.; the I.L.O. has concluded an agreement with the Council of Europe, and an agreement between U.N.E.S.C.O. and the Council of Europe is in process of negotiation.

I.L.O. and O.A.S.

98. The Agreement between the I.L.O. and O.A.S.¹ is essentially an agreement for regular consultation between the two organizations on matters of common interest. The I.L.O. undertakes to inform the O.A.S. of any plans for the development of its regional activities in the Americas and to consider any observations concerning such plans which may be communicated to it by the O.A.S. with a view to accomplishing effective co-ordination between the two organizations. The O.A.S. gives a parallel undertaking. When circumstances so require, consultations will be arranged between representatives of the two organizations to agree upon the most effective manner in which to organize particular activities and to secure the fullest utilization of the resources of the two organizations.² Subject to such preliminary consultation as may be necessary, each organization may propose items for inclusion in the agenda of appropriate bodies of the other and undertakes to have recourse to this procedure for the purpose of referring to the other organization matters which it considers can most appropriately be dealt with by that organization.³ The two organizations will co-operate to ensure the most effective utilization of their resources in respect of statistical and legislative information. There is to be the fullest and promptest exchange of information and documents concerning matters of common interest and each organization is to keep the other informed of developments in its work which are of interest to the other organization.⁴ There are also provisions varying somewhat from the usual form for reciprocal representation⁵ and for appropriate administrative arrangements to ensure effective co-operation and liaison between the staffs of the two organizations.

¹ For the text see *Fourth Report of the International Labour Organisation to the United Nations*, pp. 343-5.

² Article 1.

⁴ Article 4.

³ Article 2.

⁵ Article 5.

U.N.E.S.C.O. and O.A.S.

99. The U.N.E.S.C.O.-O.A.S. Agreement is very similar to the I.L.O.-O.A.S. Agreement but has a number of special features. It provides, for instance, that the two organizations may, through special agreements, together decide upon joint action with a view to attaining objects of common interest; these agreements are to define the way in which each of the two organizations will participate in such action and to specify the financial commitments that each is to assume. The executive heads of the two organizations may make administrative arrangements defining the part to be played by regional centres and offices in liaison between the two organizations. Any relations that may be established between U.N.E.S.C.O. and a specialized inter-American organization are to be defined by a special agreement.

W.H.O. and P.S.O.

100. The Agreement between the W.H.O. and the P.S.O.¹ is of a quite special character. Chapter II of the Constitution of the W.H.O. provides that the P.S.O., represented by the Pan-American Sanitary Bureau and the Pan-American Sanitary Conference, shall in due course be integrated with the W.H.O. and that such integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned. An agreement for this purpose was concluded between the two organizations on 24 May 1949.

I.L.O. and the Council of Europe

101. The I.L.O.-Council-of-Europe Agreement² follows the same general lines as the I.L.O.-O.A.S. Agreement, but has a number of special features. It includes a Preamble stating the basis on which the I.L.O. as a universal organization enters into such an agreement with a regional organization. This Preamble states that the I.L.O., as a universal organization, attaches the greatest importance to the maintenance and advancement, in the social and labour field, of work standards based on the principles set forth in the Constitution of the I.L.O. and the Declaration of Philadelphia, and, while co-operating with the United Nations in the maintenance of international peace and security, remains outside political controversy between nations or groups of nations and is at the disposal of all its Member nations to co-operate with them either severally or through regional organizations of which they are Members in implementing in the light of the world

¹ For the text see *World Health Organisation Handbook of Basic Documents*, 3rd ed., pp. 41-43.

² For the text see *Sixth Report of the International Labour Organisation to the United Nations*, pp. 282-286.

standards evolved through the I.L.O. the objectives for which the I.L.O. itself exists. The other new features of the Agreement are primarily a reflection of the inter-parliamentary character of the Council of Europe. The reciprocal representation provisions make it clear that invitations for such representation are to be issued to and by the Committee of Ministers; there is no provision for representation at or of the Consultative Assembly. Appropriate arrangements are, however, to be made by arrangement from time to time between the two organizations to ensure that the organs of the Council of Europe are fully informed concerning relevant activities of the I.L.O. when they are considering questions which have a bearing on these activities. Whenever the Committee of Ministers of the Council of Europe deems it necessary to hold a European regional meeting of a tripartite character to deal with matters of interest to the Council of Europe which are within the sphere of action of the I.L.O., it is to propose to the Governing Body of the International Labour Office that the latter convene such a meeting. There is provision for joint sponsorship in appropriate cases of meetings of technical experts; the manner in which action proposed by such joint meetings is undertaken is to be agreed between the two organizations. The Council of Europe may ask the I.L.O. for technical assistance on matters within the sphere of the I.L.O. whenever technical examination of such questions is desirable for the purposes of the Council of Europe. The I.L.O. is to make every effort to give all appropriate technical assistance to the Council of Europe in regard to such matters in a manner to be agreed in such cases as may arise. The Council of Europe agrees to discuss with the I.L.O. the most appropriate arrangements for co-operation between the I.L.O. and any European specialized authorities operating under the auspices of the Council of Europe with regard to matters in which the I.L.O. has an interest and to facilitate the conclusion of any necessary supplementary arrangements for co-operation with such specialized authorities.

102. The agreements between specialized agencies and regional organizations have presented special problems and difficulties. Whereas the relationship agreements between the United Nations and the specialized agencies are concluded within the general framework of the Charter and the inter-specialized agency agreements are agreements between comparable bodies, the specialized agencies and the regional organizations approach problems from altogether different angles; the functional competence of the specialized agencies and the geographical competence of the regional organizations inevitably overlap and conflict and there is no principle on the basis of which they can be reconciled. Within the United Nations system the relationship and inter-agency agreements and the elaborate machinery of co-ordination which has been evolved complement and reinforce each other; there is still no comparable machinery embracing the regional

organizations. In these circumstances the primary value of most of these agreements with regional organizations is that they provide for systematic consultation and a measure of reciprocal representation and in this manner make it possible to attempt to solve problems on a basis of practical convenience as they arise. The agreements between W.H.O. and the P.S.O., the U.N.E.S.C.O.-O.A.S. Fundamental Education Agreement, and discussions concerning the future of the Inter-American Social Security Committee which are proceeding between the I.L.O. and O.A.S., all suggest that it may be possible to provide in this manner for a considerable measure of combined or concerted effort by the specialized agencies and the regional organizations.

*Agreements between O.A.S. and the Inter-American
specialized organizations*

103. Within the inter-American system there are relationship agreements similar to the agreements concluded between the United Nations and the specialized agencies. Thus far the O.A.S. Council has made agreements with the Pan-American Institute of Geography and History,¹ the American International Institute for the Protection of Childhood,² the Inter-American Statistical Institute,³ and the P.S.O.⁴

104. These agreements differ considerably from the relationship agreements concluded between the United Nations and the specialized agencies. In general, the status of the specialized organizations within the inter-American system, in so far as it is based on these agreements, is considerably less autonomous than that of the specialized agencies within the United Nations system. This is hardly surprising since, apart from the greater homogeneity and stability which can reasonably be expected within a regional system which has matured over a long period of years, their responsibilities are not, except in the case of the P.S.O. which has a larger measure of autonomy, comparable in range with those of the major specialized agencies in the United Nations system, and the special factors which have played so large a part in determining the relations between the United Nations and some of the specialized agencies, particularly the I.L.O., the Fund, and the Bank, are absent. Although some of the terminology used is similar, the fundamental conceptions underlying the relationship, like the political background and the institutional problems involved, are essentially different.

¹ For the text see *Inter-American Juridical Yearbook*, 1948, pp. 139-41.

² For the text see *Inter-American Juridical Yearbook*, 1949, pp. 245-7.

³ For the text see *ibid.*, pp. 239-41.

⁴ For the text see *Annals of the Organization of American States*, vol. 2, pp. 309-311.

*Inter-organizational arrangements within the West European
and North Atlantic system*

105. Within the European and North Atlantic system no formal inter-organizational agreements in the technical sense as yet exist, unless the agency agreement between O.E.E.C. and the Bank for International Settlements for the management of the European Payments Union is regarded as such. The relations between O.E.E.C. and the Council of Europe are, however, governed by a statement adopted by the Committee of Ministers of the Council of Europe and the Council of O.E.E.C. which is equivalent to an inter-organizational agreement,¹ and the relations between the Council of Europe and the European Coal and Steel Community are governed by a special protocol which was discussed with the Council of Europe before signature, but is technically an annex to the Treaty constituting the Community.² The relations between the N.A.T.O. and the proposed European Defence Community are to be defined in the same way. These protocols are presumably to be regarded as an integral part of the constitutional arrangements of the European Coal and Steel and Defence Communities rather than as inter-organizational arrangements concluded by them. A number of existing texts do, however, contemplate inter-organizational agreements within the West European and North Atlantic system and a further development of such agreements may therefore be anticipated. Two of the special features of the West European situation, the development of inter-parliamentary organs and the movement towards a supranational functional federalism, are likely to make such agreements markedly different in both form and content from the relationship agreements of either the United Nations or the inter-American system.

106. The existing network of inter-organizational agreements has developed rapidly and may well still be far from complete. Most of the existing agreements envisage the possibility of supplementary arrangements as desirable and it seems probable that such supplementary arrangements will increasingly provide for various forms of combined and concerted effort. There is considerable scope for further agreements between world and

¹ This statement provides that O.E.E.C. will present to the Council of Europe for discussion by the Consultative Assembly progress reports on economic problems which have been received or are under consideration by O.E.E.C., that these reports will be sent to the Committee of Ministers on the occasion of each session of the Consultative Assembly or at any other time that may appear appropriate, and that it will be for the Committee of Ministers of the Council of Europe to request one of its members, assisted if so desired by the Secretary-General of O.E.E.C., to introduce the reports to the Consultative Assembly or its Committee on Economic Questions. The statement also envisages mutual exchange of information, joint meetings of committees to review economic problems, and co-operation between the Secretaries-General of the two organizations. For the text of the statement see Council of Europe, Consultative Assembly, Third Ordinary Session, First Part, *Documents*, Part I, pp. 64-65.

² For the text see *ibid.*, pp. 67-68.

regional organizations, including both general agreements for mutual consultation and agreements for combined or concerted effort in regard to particular matters. Some concern has been expressed that the development of such agreements should not weaken the central machinery for co-ordination nor prejudice questions of general policy which transcend the competence of the parties to such agreements. The A.C.C. has repeatedly drawn attention to the importance of ensuring that the position of the United Nations or the other specialized agencies is in no way prejudiced in any agreement concluded with a non-United-Nations organization, and its Members have agreed to undertake such consultations as may be necessary to this end. Subject to this essential precaution, there would appear to be great advantage, in a field so new, in leaving scope for further experimental developments.

*Rules of procedure, administrative instruments, and
multipartite conventions*

107. The fundamental law of inter-organizational relationships consists of the Charter of the United Nations and the constituent instruments of the other organizations and of the relationship and other inter-organizational agreements which have been concluded thereunder, but in order to form a satisfactory picture of these relationships as they have developed in practice we must extend our survey to include the wide variety of subsidiary instruments which implement or amplify these basic texts. These subsidiary instruments include: rules of procedure and similar instruments; administrative instruments;¹ and multipartite conventions and similar instruments containing provisions which have a bearing on inter-organizational relationships.

Rules of procedure

108. The rules of procedure of the principal organs of the United Nations (except the Security Council) and other United Nations bodies, of the specialized agencies, and of some of the other organizations contain a wide variety of provisions concerning inter-organizational relationships. Although the majority of these provisions may be regarded as dealing with procedural routine, others embody important and complex procedural devices and even the provisions of a routine character have a cumulative importance which is substantial.

Consultation before commitment

109. There is one question, that of consultation before commitment, on which the A.C.C. has recommended model rules for adoption by the various

¹ For a fuller survey of rules of procedure and administrative instruments see 'Co-ordination: A New Problem of International Organisation', paragraphs 153-81.

organs of the United Nations and the specialized agencies which may be concerned.¹ These rules are designed to ensure that activities which may affect other organizations are not decided upon until such consultation takes place and that this procedure is made possible by the timely submission of items for consideration by various organs. A special rule provides for consultation prior to the adoption of international conventions by inter-governmental bodies and provides that any comments on proposed conventions made by other organizations which may be concerned shall be brought before the body by which the conventions are to be adopted. This would appear to be a particularly important and valuable safeguard in view of the need to avoid inconsistencies in the obligations assumed by states under instruments adopted under the auspices of different bodies. The model rules are now in process of adoption by the various bodies concerned.

110. The complicated tangle of rules of procedure of uneven importance which has developed prompts three general reflections. In the first place, these rules of procedure differ in legal character from, and are subsidiary to, the provisions of the Charter, the other constituent instruments, and the agreements; they may, in course of time, come to be regarded as evidence of an accepted interpretation of the basic instruments and agreements, but they cannot be relied upon against those provisions; more particularly, the absence from the rules of procedure of a particular body or organ of any provision conferring a right provided for in an agreement cannot be regarded as limiting or qualifying the terms of the agreement. In the second place, differences between the rules of procedure of different bodies do not necessarily involve differences of actual practice; in the I.L.O., for instance, a number of the steps explicitly provided for in the rules of procedure of other bodies, such as the inclusion of items in the agenda of the Governing Body and the notification of meetings and communication of the agenda and documents to other organizations, have always been taken administratively; the rules of procedure of each body express its general atmosphere and practice, and provision for relations with other organizations has naturally been made within the framework set by this practice. It is partly for this reason and partly because of the differences in composition and functions between the various organizations that, while there may be scope for further model rules of procedure on various subjects, a suggestion made by the Preparatory Commission of the United Nations that there should be a common code of rules of procedure for all international meetings has met with very little response. In the third place, the main significance of all these rules is to be found less in their detailed content, which may sometimes bear the mark of improvisation, than in the general policy which

¹ See *Ninth Report of the Administrative Committee on Co-ordination*, U.N.Doc. E/1991, pp. 34-35.

they disclose of progressively including in the working rules of procedure of each body provisions designed to make the co-operative relationships contemplated by the basic instruments and the agreements fully effective; this policy may not be entirely consistent or complete but there can be no question that it has been dominant; its essence has been to afford the fullest opportunities for each organization to keep in touch with the activities of the other in the formative stages of their development and so to influence policies as they are formulated with a view to effective co-ordination by consultation, recommendation, and agreement.

Administrative instruments

111. Within the United Nations system administrative instruments adopted by the General Assembly are of considerable importance in supplementing the constituent instruments, the relationship agreements, and the various rules of procedure. These instruments bear in various ways on the position of the specialized agencies, generally by entitling them to exercise various rights, privileges, or powers, or permitting them to have recourse to certain procedures or to participate in common arrangements established by the Assembly, subject in certain cases to their fulfilling prescribed conditions. In these instruments, which include the Financial Regulations, the Treaty Registration Regulations, the Immunities Convention, the Headquarters Agreement, the Joint Staff Pension Regulations, and the Statutes of the Administrative Tribunal, a variety of legal and procedural devices has been adopted to promote a larger measure of co-ordination and facilitate the adoption of common arrangements on various matters.

Multipartite conventions

112. It remains true within the United Nations system, as it was within the League of Nations system, that the multipartite legislative instrument is one of the most important devices available for the further development of international law and organization. Multipartite instruments adopted under the auspices of one organization may contain provisions bearing on its relations with another organization; they cannot, of course, place obligations on that organization without its consent, but they may confer rights or privileges upon it, entrust powers or responsibilities to it subject to its consent, provide for the utilization of its machinery or findings, or provide for consultation or agreement with it for the purpose of action to be taken under the instrument. It seems probable that the growing network of multipartite instruments concluded under the auspices of the United Nations and the specialized agencies will increasingly include provisions whereby an instrument adopted under the auspices of one agency utilizes the machinery or services of, or includes provisions to meet the special

preoccupations of, another. Similar provisions may be of special importance in cases in which a specialized agency and a regional organization have a common interest in a subject which it is proposed to deal with in a multi-partite instrument.

IV. THE MACHINERY OF CO-ORDINATION

113. The practical effect of the provisions which we have examined necessarily depends primarily on the institutional arrangements through which co-ordination is made effective within the framework which they establish. These institutional arrangements comprise: national arrangements in various countries for ensuring consistency of policy on the part of the delegations of the country concerned in different international organizations; arrangements for securing internal co-ordination within each international organization; co-ordination by means of inter-governmental co-ordinating machinery such as the General Assembly and the Economic and Social Council, and bodies directly advisory to them such as the Advisory Committee on Administrative and Budgetary Questions of the General Assembly and certain of the functional commissions of the Economic and Social Council, and inter-governmental bodies having a certain measure of responsibility for co-ordination in some special field, such as the Trusteeship Council; inter-organizational machinery of co-ordination such as the A.C.C., the T.A.B., the I.C.S.A.B., and the Joint Panel of External Auditors; various special forms of inter-organizational machinery designed to meet special needs; and, potentially, judicial machinery such as the International Court of Justice.

National co-ordination

114. The cardinal importance of national co-ordination is now generally recognized. The international bodies entrusted with responsibility for various aspects of co-ordination cannot hope to discharge successfully the tasks entrusted to them unless their efforts are supported by effective co-ordination within the governments which, by instructing their representatives in the different international organizations, are in most cases the primary influence in determining the policies of these organizations.

115. In a number of countries, special national machinery has been created to secure the necessary co-ordination. The arrangements for this purpose adopted in each country must naturally be adapted to the political and administrative traditions and structure of the country, but a comparison of the methods adopted for the purpose in different countries yields some instructive lessons on the subject.¹ From a practical standpoint the most

¹ See Royal Institute of International Affairs, *United Kingdom Administration and International Organisations* (1951), and U.N.E.S.C.O., *National Administration and International Organisation—A Comparative Survey of Fourteen Countries* (1951).

immediate need is perhaps to ensure the systematic and authoritative briefing of delegates to all meetings with a view to avoiding the taking of contrary positions in different bodies.

Internal co-ordination within each international organization

116. It is no less essential that the different international organizations should make arrangements which enable them to secure effective internal co-ordination within each organization and to express an authoritative view on questions affecting them as organizations or relating to matters within their special field of competence which arise in other bodies. Without a high degree of internal co-ordination within each organization there can be no effective inter-organizational co-ordination. The importance in this connexion of co-ordination and discipline within the staff of each organization has been emphasized within the A.C.C., the members of which have agreed with each other to take the measures necessary for this purpose. More difficult organizational problems arise in respect of the work of conferences and committees. Differences in the composition, functions, powers, and mutual relationships of the various organs of the different organizations make it inevitable that the arrangements made to enable each organization to express an authoritative view in its relations with other organizations should differ considerably. The value of such arrangements depends, of course, not on their formal completeness but on their practical effectiveness. It is in the case of the United Nations itself that the difficulties of making satisfactory arrangements are greatest, partly owing to the separation of powers within the central structure of the United Nations and partly owing to the intrinsic difficulties of expressing a general view on behalf of an organization which by its nature aspires to universality in both range of interests and membership.

Inter-governmental machinery for co-ordination

117. Under the Charter and the relationship agreements, the General Assembly and the Economic and Social Council have a primary responsibility for co-ordination; generally speaking, they have no authority to take decisions binding on specialized agencies or other inter-governmental organizations; their role is to co-ordinate by processes of consultation, agreement, and recommendation; but it was intended that they should exercise in this manner a unique influence which would set a tone of concerted effort for all of the international organizations and progressively overcome such difficulties as might arise. The experience of the last five years has clarified the manner in which the General Assembly and the Council interpret and will attempt to discharge their responsibilities.

The General Assembly

118. The General Assembly has taken at successive sessions a continuing and developing interest in the general problems of co-ordination. At its first few sessions the Assembly dealt primarily with the organizational, procedural, and administrative and financial aspects of co-ordination. The same themes run through the resolutions on the questions adopted from year to year: improved procedures of co-ordination, the avoidance of overlapping and duplication, priorities and concentration of effort, financial retrenchment and prudence, uniformity of administrative and financial practice, and greater use of common services. Gradually the Assembly has been tending to give increased attention to the substantive problems of programme co-ordination. While the Assembly has, with the assistance of the Economic and Social Council, dealt directly with a number of questions with important co-ordination aspects, notably with questions arising out of successive international emergencies, such as those in Palestine and Korea, its normal method has been to direct the attention of other organs of the United Nations and of the specialized agencies to the importance or urgency of particular tasks and to content itself with giving a stimulus without undertaking any detailed responsibility for co-ordination. This limitation is inherent in the composition and procedure of, and indeed in the very nature of the functions entrusted to, the General Assembly. Subject to the powers of the Security Council as qualified in practice by the Acheson Plan, it is the Assembly which is competent to take authoritative and final decisions on behalf of the United Nations. It approves on behalf of the United Nations relationship agreements, administrative instruments, and conventions, protocols, or other instruments which involve obligations for the United Nations. It votes the budget of the United Nations and is entitled to make recommendations concerning the budgets of the specialized agencies; in this capacity it exercises the powers of criticism and suggestion which always accompany the power of the purse. It is the Assembly which affords the most authoritative forum for the expression of the general policies of governments concerning international organization; it is therefore in the Assembly alone that the general policy of the United Nations can be defined, and through discussion and recommendation by the Assembly a powerful stimulus can be given to action by any part of the United Nations system. These unique features of its position, powers, and responsibilities give the Assembly the central place in the machinery of co-ordination, but for the detailed preparation of its work and execution of the principles formulated by it the Assembly must necessarily, in normal circumstances, rely primarily upon the Economic and Social Council and the A.C.C. in respect of policy and programme questions in the economic and social

field and primarily upon the Advisory Committee on Administrative and Budgetary Questions and the A.C.C. in respect of the administrative and financial relationships of the various parts of the United Nations system.

The Economic and Social Council

119. If the responsibility for formulating the general policy of the United Nations in co-ordination matters rests with the General Assembly, it is the Economic and Social Council which has the primary continuing responsibility for making effective the arrangements for co-ordination envisaged in the Charter. The Council was responsible for negotiating with the specialized agencies the relationship agreements subsequently approved by the General Assembly; it normally deals in the first instance with questions concerning the application of the agreements; it was responsible for creating and supervises the work of the functional and regional commissions; with the co-operation of the A.C.C. it has worked out the details of the processes of co-ordination provided for in the Charter, the agreements, and the relevant Assembly resolutions; it reviews each year the reports of the specialized agencies to the United Nations and makes any requests, suggestions, or recommendations which may arise out of its examination of the reports.

120. At the suggestion of the A.C.C., the Council has adopted the practice of selecting from time to time particular questions which call for special consideration from the standpoint of co-ordination. The action which it has taken in successive years since 1949 in respect of such questions as technical assistance for economic development,¹ full employment,² the financing of economic development and land reform is a welcome indication that the Council is gradually assuming the responsibility vested in it by the Charter for the general co-ordination of international economic policy. In the social field the Council has increasingly tended to adopt the same method of approach.

121. One of the questions to which the Council has given special attention is that of the simplification of the structure of other inter-governmental organizations having responsibilities similar to those of the United Nations and the specialized agencies. It has taken a vigorous interest in this matter and appears to be securing substantial results.

122. In both the Council and the General Assembly there has been repeated insistence on the desirability of defining priorities for international action and devising a procedure for determining such priorities. After discussions lasting over three years, the Council adopted in 1950 a report stating its considered conclusions on the matter.³ As regards priorities among broad fields of work, the report suggests that general recommendations

¹ Resolution 222 (IX).

² Resolution 370 (XIII).

³ Economic and Social Council, *Official Records: Fifth Year, Eleventh Session*, 3 July-16 August 1950, Supplement No. 1, Resolutions, pp. 65-70.

by the Council might contribute much to alining international effort and thereby assist in concentrating the efforts of the United Nations and the specialized agencies towards agreed objectives; it proposes that the Secretary-General, in collaboration with the A.C.C., should assist the Council in this task by indicating certain broad fields of activity and objectives which, in their opinion, might receive major emphasis and be tackled either by one agency or by the United Nations as a team. It points out that the process of establishing priorities as between programmes within a particular field of work or as between projects within programmes must inevitably be a highly complex one which can only be undertaken by the organs directly responsible for the field of work concerned, but indicates certain provisional criteria which it suggests should be employed by the organs of the United Nations and the specialized agencies concerned in order to secure a common approach to the evaluation of priorities. The criteria include two overriding principles: that international action will be justified only in cases where the desired results cannot be achieved by unassisted national action with some degree of certainty and within a reasonable time; and that the proposed action must be technically sound and adapted to its purpose. The detailed criteria relate to the urgency, feasibility, and scope of the proposed action, the extent to which the necessary preparatory work and co-ordination have been undertaken, and the prospective results; under this last head, one of the criteria is whether the proposed action will assist and stimulate national action so as to ensure that the international effort expended produces the maximum results at the national or regional level.

123. The Council, like the Assembly, has increasingly adopted the practice of referring matters to the competent specialized agencies for consideration, either on its own initiative or at the request of non-governmental organizations. This practice is not merely a guarantee against the duplication by the Council of work responsibility for which has been entrusted to the competent agencies; it is also a method whereby the Council can stimulate action by individual agencies calculated to reinforce the overall international effort; whether its action has this effect in practice will of course be determined primarily by the judgment which it exercises, and the sense of timing which it displays, in requesting specialized agencies to give special attention to particular topics.

The functional commissions of the Economic and Social Council

124. The position of the functional commissions of the Economic and Social Council in relation to the inter-governmental machinery of co-ordination presents special problems. The terms of reference of these commissions differ considerably in the extent to which they contemplate that the commissions will play a part in the process of co-ordination. The

position may be simply summarized as being that, while the functional commissions may make a significant contribution to co-ordination in the more technical fields, in the major fields of both economic and social policy the Council itself must assume direct responsibility in order to make such a contribution.¹

The Advisory Committee on Administrative and Budgetary Questions

125. The Advisory Committee on Administrative and Budgetary Questions consists of nine persons, including at least two financial experts of recognized standing, appointed by the General Assembly to examine and report on the Budget submitted by the Secretary-General to the Assembly, to advise the Assembly concerning any administrative and budgetary matters referred to it, to examine on behalf of the Assembly the administrative budgets of specialized agencies and financial arrangements with such agencies, and to consider and report to the Assembly on the auditors' reports on the accounts of the United Nations and the specialized agencies.² In addition to commenting each year on the budget of each specialized agency and advising on such matters as proposed temporary repayable advances to certain specialized agencies, the Committee has dealt in successive reports³ with virtually every aspect of administrative and budgetary co-ordination and the resolutions adopted by the Assembly on these subjects have been based to a large extent on its recommendations. The Advisory Committee, which works increasingly in co-operation with the A.C.C., is a major influence in securing co-ordination in respect of administrative and budgetary relations.

Inter-organizational machinery of co-ordination

126. Important as are the co-ordinating functions entrusted to the General Assembly and the Economic and Social Council by the Charter, experience has shown that these functions cannot be discharged effectively in practice without constant co-operation between the United Nations and the specialized agencies organized through inter-organizational machinery of co-ordination which was not provided for in the Charter and has been evolved since on empirical lines. This machinery now includes the A.C.C., the T.A.B., the I.C.S.A.B., and the Joint Panel of External Auditors. The A.C.C. and the T.A.B. are bodies of administrative officers responsible individually to the participating organizations; the I.C.S.A.B. and the Joint Panel of External Auditors are high-level bodies of independent

¹ The matter is discussed more fully in Jenks, 'Co-ordination: A New Problem of International Organisation', paras. 203-5. See also A. Loveday, 'An Unfortunate Decision', in *International Organization*, I (1947), pp. 279-90.

² Resolution 14 (I).

³ The Reports of the Committee, of which there are a number each year, are published regularly in the *Official Records* of the General Assembly.

experts; but all four bodies are essentially expressions of the principle that the availability of continuous official advice of the highest quality and authority is a decisive element in the effective staff work without which it is impracticable to achieve satisfactory co-ordination through representative bodies such as the Assembly and the Council.

The Administrative Committee on Co-ordination

127. The A.C.C. consists of the Secretary-General of the United Nations and the executive heads of the specialized agencies. Though members of the Committee when unable to be present can be replaced by senior representatives by special arrangement, it has been usual for members to attend personally.

128. The Secretary-General took the initiative in the establishment of the Committee in pursuance of a resolution adopted by the Economic and Social Council on 21 September 1946, which requests him to establish a standing committee of administrative officers consisting of himself, as chairman, and the corresponding officers of the specialized agencies brought into relationship with the United Nations for the purpose of taking appropriate steps, under the leadership of the Secretary-General, to ensure the fullest and most effective implementation of the agreements entered into between the United Nations and the specialized agencies.¹ The relationship agreements, except those with the Fund and the Bank, each contain an undertaking by the agency to participate in and to co-operate with any body or bodies which the Council may establish for the purpose of facilitating co-ordination; this provision has always been understood to relate primarily to the A.C.C. and in the Fund and Bank agreements it is replaced by a specific undertaking to participate, to the extent consistent with the provisions of their articles of agreement, in the work of the A.C.C. and its subsidiary bodies. In view of these provisions there has sometimes been a tendency in the Economic and Social Council to regard the A.C.C. as a Commission of the Council. The better view would appear to be that the Committee, while established at the request of the Council and in pursuance of the terms of the agreements, derives its authority from the inherent powers of its members as chief executive officers of their respective organizations and is essentially a device for enabling them, meeting in that capacity, to discuss matters of common concern and thus to discharge their constitutional obligations in such a manner as to harmonize the action taken by the various organizations in regard to such matters. Practice appears to support this view, since the Secretary-General submits the reports of the Committee² to the Council and the other executive heads

¹ Ecosoc Resolution 13 (III).

² For the successive reports of the Committee see U.N.Docs. E/614, E/625, E/846, E/1076, E/1340, E/1572, E/1682, E/1865, E/1991, E/2161.

submit them as required to their corresponding bodies, and co-ordination is secured partly by action taken by the Council in respect of matters within its competence but primarily by means of concurrent decisions by the appropriate bodies of all the organizations concerned.

129. The A.C.C. maintains a Preparatory Committee of deputies and a network of consultative committees and technical working groups for the purpose of preparing its work and dealing with questions of detail and thus enabling the executive heads to concentrate their attention at meetings of the A.C.C. itself on questions of policy. The A.C.C. has ruled that all these bodies are to proceed by general agreement and that questions on which such agreement cannot be reached are, when necessary, to be referred to the executive heads for further consideration; this practice does not preclude agreement being reached on particular proposals by some but not all of the participating organizations.

130. In the early stages of its work, when the United Nations and the new specialized agencies were all confronted with urgent organizational and administrative problems, the A.C.C., like the General Assembly and the Economic and Social Council themselves, devoted a large part of its attention to such problems, but has from the outset been conscious of its responsibility to advise on wider questions of policy and to give increasing attention to questions of programme co-ordination and priorities for international action. It may be expected in the future to develop these aspects of its work and thereby to facilitate agreed recommendations by the Economic and Social Council and the General Assembly on substantive questions of economic and social policy and concurring decisions on such questions by the agencies concerned. As administrative officers, the members of the A.C.C. have no authority to take decisions in respect of such questions but, as the trusted advisers of their respective governing bodies, they are in a position to exercise a co-ordinating influence which may well be decisive in practice.

Technical Assistance Board

131. Among the other inter-agency co-ordinating bodies established through the A.C.C., T.A.B. is in a somewhat special position. It was established by the A.C.C. in November 1949 in response to a request expressed by the Economic and Social Council and confirmed by the General Assembly, but its composition and functions and certain aspects of its procedure are governed by a resolution of the Economic and Social Council, and though the Board is regarded as being the A.C.C. acting for a special purpose and remains subject to the authority of a plenary meeting of the A.C.C., which has indicated that it proposes to undertake twice a year a special review of the high policy aspects of the programme, it reports directly to the Technical Assistance Committee of the Economic and Social Council,

commonly known as T.A.C. These special arrangements have been accepted for the expanded programme of technical assistance by the participating organizations as part of the conditions of their participation in the technical assistance scheme. It is an essential feature of these arrangements that, while the Board as a whole reports to T.A.C. and is bound by decisions of the T.A.C. on any conflicts or questions which as a Board it may submit to T.A.C., the individual members of the Board, as representatives of the executive heads of their respective organizations, report to and receive their instructions from executive heads responsible to the governing bodies or equivalent organs of the different participating organizations. This situation clearly involves certain possibilities of future constitutional difficulties which it may be hoped will be avoided on empirical lines.

132. The Board consists of representatives of the United Nations, I.L.O., F.A.O., U.N.E.S.C.O., W.H.O., I.C.A.O., I.T.U., and W.M.O.; representatives of the Fund and the Bank, which do not participate in the expanded programme, attend as observers. The T.A.B. Secretariat is an important innovation in that it is an inter-agency secretariat responsible through T.A.B. to all of the participating organizations though subject to the authority of the Secretary-General in administrative matters. A re-organization of the Board at present contemplated envisages the appointment of a full-time Executive Chairman who would not have operating responsibility for the technical activities of any of the participating organizations but would take primary responsibility for liaison with governments in respect of matters concerning the programme as a whole, as well as with other technical assistance programmes carried on by regional governmental and private organizations. The Board maintains Resident Technical Assistance Representatives in a number of recipient countries who have been entrusted on behalf of the participating organization with certain functions in regard to the co-ordination of requests for technical assistance. Technical assistance is normally granted to recipient governments in accordance with terms defined in basic and supplementary technical assistance agreements. A model form of basic agreement has been approved by the Board and joint basic agreements are frequently negotiated on behalf of all or a number of the participating organizations.¹

133. In the earliest stages of its work, T.A.B., like the A.C.C. itself, was primarily concerned with organizational and administrative matters. This preliminary organizational phase of its work is now drawing to a close, and

¹ The model form of agreement has been published by the Board; see *The Expanded Programme of Technical Assistance for Economic Development of Underdeveloped Countries*, an explanatory booklet issued on behalf of the United Nations and the specialized agencies participating in the Programme, the Technical Assistance Board, United Nations, New York, 3 January 1951, ref. No. ST/TAA/2 Appendix II(a), Specimen Basic Agreement, and Appendix II(b), Supplementary Agreement to the Basic Agreement.

it is dealing increasingly with the substantive co-ordination of technical assistance activities into an integrated expanded programme.¹

The International Civil Service Advisory Board

134. The I.C.S.A.B. was also established by the A.C.C. in response to a resolution adopted by the General Assembly, but its terms of reference and composition are determined by the A.C.C., the members of the Board are chosen by the Secretary-General with the advice and consent of the A.C.C., and the Board reports to the A.C.C. through the Secretary-General. The terms of reference of the Board are to contribute to the improvement of recruitment and related phases of personnel administration in the international organizations. The Board is advisory and consultative; the A.C.C. decision establishing it specifies that it has no responsibility for, or control of, the operation of recruitment or related phases of personnel administration, but that experience may show the desirability at a later date of amending the Board's terms of reference to permit the delegation by organizations of certain specific operating responsibilities. Members are appointed in their personal capacity as individuals who have earned wide public trust in their judgment and whose high qualifications will ensure respect for the Board's advice. The composition of the Board is particularly distinguished and influential, and includes persons with wide experience of administration in international, national, and commercial bodies. The Board has made a valuable report on recruitment methods and standards² and has been requested by the A.C.C. to report on the further development of methods of in-service training and standards of professional conduct in the international civil service.

The Joint Panel of External Auditors

135. The Joint Panel of External Auditors was established by an agreement reached in the A.C.C. confirmed by a resolution of the General Assembly³ and concurring decisions of the appropriate bodies of the participating agencies. The panel is composed of persons having the rank of Auditor-General (or its equivalent in the various Member states) and consists of the auditors appointed by the United Nations and the specialized agencies, chosen by common consent in such a manner that the members of the panel do not exceed nine in number. Each organization selects one or more members of the panel to perform its audit. Members of the panel selected to perform audits are requested to take appropriate steps, in particular by meeting together annually, to co-ordinate their audits and to

¹ For the successive reports of the Board see U.N.Docs. E/1742, E/1911, E/2054.

² United Nations, I.C.S.A.B., *Report on Recruitment Methods and Standards for the United Nations and the Specialised Agencies*, 1950.

³ General Assembly Resolution 347 (IV).

exchange information on methods and findings. The panel of auditors is invited to submit from time to time any observations or recommendations which it may wish to make on the co-ordination and standardization of the accounts and financial procedures of the United Nations and the specialized agencies. The United Nations, the I.L.O., F.A.O., U.N.E.S.C.O., and W.H.O. have agreed to participate in the scheme.

136. Taken together, the A.C.C., the T.A.B., and the I.C.S.A.B. and the Joint Panel of External Auditors are a substantial contribution to the development of adequate inter-organizational machinery of co-ordination capable of playing an increasingly important role in the growth of an effective system of world institutions.

137. This general inter-organizational machinery of co-ordination is supplemented by a variety of arrangements for joint committees of various types, joint secretariats, and joint missions, and by special forms of inter-organizational machinery¹ designed to facilitate joint, combined, or co-ordinated action in regard to particular problems.

138. All of these institutional developments have occurred during the brief period since 1945. During that period, the new international organizations have come into being; the legal framework for their mutual relationships has been elaborated; and these complex institutional arrangements have been evolved. It is characteristic of these arrangements that they are somewhat empirical and untidy. Their strength lies in the manner in which the different types of co-ordination machinery—the national machinery of co-ordination, the machinery for international co-ordination within each agency, the General Assembly and its Advisory Committee on Administrative and Budgetary Questions, the Economic and Social Council, the other United Nations and specialized agency organs which contribute to co-ordination in specific fields, the A.C.C., and the other inter-organizational machinery of co-ordination—all tend increasingly, as the system develops, to reinforce each other. The whole scheme rests upon the underlying assumption that there cannot be, in the modern world, any single focus of authority where decisions on matters of international concern can be centralized. In these circumstances it is essentially a scheme for securing widespread agreement by processes of conciliation and recommendation. The chief weakness of the scheme is that the institutional arrangements which have been evolved do not embrace the regional organizations, but the seriousness of this weakness has been increasingly recognized and there are a number of indications that steps will be taken to correct it as rapidly as political conditions allow. Only the future can show how solid a founda-

¹ E.g., the Fact-Finding and Conciliation Commission on Freedom of Association; see the Note on this subject at pp. 348-59, below.

tion has been laid, but an encouraging start has been made in devising institutional arrangements for handling a problem which is entirely new in the development of the art and science of government.

139. So far as the United Nations system is concerned, it is significant that, while the political strains arising out of the international situation after the Second World War and the pace at which new elements with widely varying traditions and interests have come to play a leading part in international life have periodically produced a widespread sense of frustration and futility, there has been steady progress towards better co-ordination which has been increasingly recognized by the General Assembly. As experience has been gained, it has become clear that no arrangements for co-ordination can yield satisfactory results unless three prior conditions can be fulfilled.

140. In the first place, there must be general agreement upon the objectives of international action in the field of social and economic policy; not necessarily upon detailed methods of action, which it may be necessary to adjust to wide variations of national policy and successive changes in the general economic situation, but at least upon broad objectives.

141. Secondly, there must be a whole-hearted willingness on the part of the specialized agencies and regional organizations to regard all of their activities as being essentially co-operative contributions to the attainment of a larger objective, an equally whole-hearted recognition on the part of the United Nations that the primary responsibility for action in their respective fields rests with the specialized agencies and that their autonomy is essential to their vitality, and an adequate basis of political understanding and technical co-operation between the United Nations and specialized agencies on the one hand and the regional organizations on the other.

142. Thirdly, there must be effective co-ordination within each government of the policies followed by its representatives accredited to the United Nations and the various specialized agencies and regional organizations.

143. When the magnitude and urgency of the tasks calling for international action is fully realized, the challenge and opportunity which the needs and resources of the age present should afford a powerful stimulus to the fulfilment of these conditions. If they can be fulfilled, the existing legal and institutional arrangements, while continuing to require considerable amplification of scope and elaboration in detail, accompanied by fuller utilization by sustained effort of the facilities for better co-ordination which they provide, may well be found to represent the most hopeful approach to the solution of the complex problems involved. If they are not fulfilled, no legal or institutional arrangements, no matter how appealingly simple in appearance or ingeniously devised, are likely to be politically viable.

THE LEGAL STATUS OF THE PREMISES OF THE UNITED NATIONS

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THE location of the Headquarters of the United Nations and of those of the various Specialized Agencies is now common knowledge, but the existence and contents of the Headquarters Agreements which have been concluded between the Organizations,² on the one hand, and the different host states on the other are not so widely known. The purpose of this article is to discuss the legal status of the premises³ of the Organizations in the states in whose territory their Headquarters are located. It is pertinent, therefore, to set out a list of the Headquarters Agreements which are at the present time⁴ in effect, since their provisions very largely govern the questions which are to be examined.

I. Legal instruments governing the status of the Organizations in the states of their Headquarters

The following Headquarters Agreements were in force at the end of 1951:

(a) United Nations and the United States of America.

Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.⁵

(b) United Nations and the United States of America.

Interim Headquarters Agreement between the United Nations and the United States of America.⁶

(c) United Nations and Switzerland.

Interim Arrangement on the Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council.⁷

¹ The views expressed in this article are the personal views of the author.

² The term 'Organizations' as used throughout this article refers only to the United Nations and the Specialized Agencies.

³ The term 'premises' is used throughout this article, unless otherwise indicated, to mean the Headquarters Area of each Organization.

⁴ 1 December 1951.

⁵ *United Nations Treaty Series* (hereinafter cited as *U.N.T.S.*), vol. xi, p. 11. Came into force on 21 November 1947 by an Exchange of Notes, in accordance with s. 28.

⁶ *U.N.T.S.*, vol. xi, p. 347. Came into force on 18 December 1947, as from the date of signature in accordance with Article V. This Agreement is only inserted in this list for the sake of completeness, as it merely applied the provisions of the Headquarters Agreement (see (a) above) to the Interim Site of the United Nations at Lake Success.

⁷ *U.N.T.S.*, vol. i, p. 163. Came into force on 1 July 1946 in accordance with s. 28.

- (d) *United Nations Educational, Scientific and Cultural Organization (U.N.E.S.C.O.) and France.*

Accord provisoire entre le Gouvernement de la République française et l'Unesco concernant les privilèges et immunités.¹

- (e) *International Labour Organization (I.L.O.) and Switzerland.*

Procès-verbal, Agreement, Arrangement for the execution of the Agreement, and Declaration concerning the legal status of the International Labour Organization after the dissolution of the League of Nations.²

- (f) *World Health Organization (W.H.O.) and Switzerland.*

Agreement concerning the legal status of the World Health Organization and Arrangement for the execution of the said Agreement.³

- (g) *Food and Agriculture Organization (F.A.O.) and Italy.*

Agreement between the Government of the Italian Republic and the Food and Agriculture Organization of the United Nations regarding the Headquarters of the Food and Agriculture Organization of the United Nations.⁴

- (h) *International Civil Aviation Organization (I.C.A.O.) and Canada.*

Agreement between the International Civil Aviation Organization and the Government of Canada regarding the Headquarters of the International Civil Aviation Organization.⁵

- (i) *International Refugee Organization (I.R.O.) and Switzerland.*

Agreement and Arrangement for the Execution of the Agreement concerning the legal status of the International Refugee Organization in Switzerland.⁶

- (j) *International Telecommunication Union (I.T.U.) and Switzerland.*

Exchange of Letters between Switzerland and the International Telecommunication Union, of 6 February 1948 and 15 February 1948, agreeing to the application of the

¹ U.N.E.S.C.O. Doc./Ext. Rel/3/1947. The *Accord provisoire* was concluded in its original form by virtue of an Exchange of Letters between the French Government and the Preparatory Commission of U.N.E.S.C.O., dated 5 and 14 August 1946. Then, as amended by the first General Conference of U.N.E.S.C.O., it was extended by virtue of a further Exchange of Letters dated 23 January and 19 February 1947, and came into force on the latter date. See U.N.E.S.C.O. Docs. 4C/OXR/15, 22 July 1949, and 5C/OXR/18, 17 April 1950.

² U.N.T.S., vol. xv, p. 377. The Agreement came into force on 27 May 1946 in accordance with Article 28, and the Arrangement came into force on the same date in accordance with Article 14.

³ U.N.T.S., vol. xxvi, p. 331. The Agreement came into force on 21 August 1948, in accordance with Article 28, and the Arrangement came into force on the same date in accordance with Article 14. In conformity with the terms of an Exchange of Notes of 23 December 1948, and 12 January 1949, the Agreement and the Arrangement became effective retroactively from 17 July 1948.

⁴ This Agreement came into force on 1 February 1951, pursuant to an Exchange of Notes under s. 36 (a).

⁵ I.C.A.O. Doc. 7147, dated 27 April 1951. The Agreement came into force on 1 May 1951 after an Exchange of Notes in accordance with Article IX, s. 41. The constitutional point may be noted that the Agreement contains no such clause as is to be found in Article I, s. 1 (b) of the United Nations Agreement with the U.S.A., relating to the responsibilities of federal, state, and local authorities.

⁶ I.R.O. Docs. IRO/LEG/GOV/4 and IRO/LEG/GOV/5. The Agreement came into force on 15 September 1948.

Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, to the International Telecommunication Union.¹

(k) *Universal Postal Union (U.P.U.) and Switzerland.*

Exchange of Letters between Switzerland and the Universal Postal Union, of 3 February 1948 and 22 April 1948, agreeing to the application of the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, to the Universal Postal Union.²

Thus, all the Specialized Agencies, as well as the United Nations, have now concluded agreements with the states in whose territory their Headquarters are located, with the exception of the International Monetary Fund (Fund), and the International Bank for Reconstruction and Development (Bank). With regard to the legal position in the United States of the Fund and the Bank, whose Headquarters are in Washington, D.C., this is governed by the provisions of the International Organizations Immunities Act of 29 December 1945 (U.S. Public Law 291, 79th Congress),³ and by the provisions of Articles IX and VII of their respective constituent instruments, which articles spell out the privileges and immunities to be accorded to these Organizations in the territories of each Member state.⁴ It may be mentioned that at the present time the World Meteorological Organization (W.M.O.) has not yet become a Specialized Agency, though it will do so when the Agreement between the Organization and the United Nations is approved by the General Assembly,⁵ it having been approved by the Congress of the W.M.O. in the spring of 1951.

¹ I.T.U. Doc. CA. 113E Revised, Annex 2 and Annex 4. The application of the Interim Arrangement to the I.T.U. was made retroactive to 1 January 1948.

² U.P.U., *Documents de la Commission exécutive et de liaison*, Berne (1949), p. 37.

³ 59 Stat. 669 (1945), 22 U.S.C.A., s. 288. See Preuss, 'The International Organizations Immunities Act', in *American Journal of International Law*, 40 (1946), pp. 332-45. The Act applies by virtue of Presidential Executive Orders under s. 1 thereof to, amongst others, all those Organizations whose Headquarters are located in the United States.

⁴ The United States is a member of both the Fund and the Bank, having signed the Articles of Agreement thereof, each of which contains a provision that a signatory Government shall deposit an instrument (with the Government of the United States of America) stating that it has taken all steps necessary to enable it to carry out all its obligations thereunder (Fund, Article XX, s. 2 (a); Bank, Article XI, s. 2 (a)). Furthermore, each Member Government of the Fund and the Bank undertakes to take 'such action as is necessary' in its own territories, for the purpose of making effective in terms of its own law the principles set forth in the privileges and immunities article (Fund, Article IX, s. 10; Bank, Article VII, s. 10).

⁵ It is anticipated, at the time of writing, that this will take place during the Sixth Session of the General Assembly in Paris. The Headquarters of the W.M.O. will be transferred from Lausanne to Geneva, Switzerland, in the spring of 1952.

With regard to the question of a Headquarters Agreement, the W.M.O. at its First Congress adopted Resolution CB authorizing 'The Executive Committee to enter into an agreement with the Swiss Federal Council on the same basis as the Agreement of the World Health Organization with the Swiss Federal Council' (W.M.O. Doc. Cg 1/Doc. 291 (2.v.1951)).

It may be generally noted in this connexion that the legal status of the United Nations in the United States is not only governed by the provisions of the Headquarters Agreement, but that also U.S. Public Law 291, referred to above, specifies certain privileges and immunities which attach to the Organization.¹ It will therefore be necessary to refer to the provisions of this Law, as well as to those of the Headquarters Agreement, in dealing with the United Nations.² With regard to the Specialized Agencies which have concluded Headquarters Agreements, the privileges and immunities which they are granted by their host states are exclusively set out in the respective Agreements. In this connexion it is necessary to recall that the basic principle of all the privileges and immunities set out in the various agreements is the relevant clause dealing with such matters, to be found in the constituent instrument of each Organization.³ Most of these clauses stipulate that the privileges and immunities to be enjoyed by the Organization shall be those which are necessary for the fulfilment of its purposes.⁴ It is proposed generally to refer only to those clauses which set out specific immunities.⁵

Since the United Nations, the I.T.U., and the U.P.U. are all bound by the terms of the United Nations Arrangement with Switzerland in their relations with the latter, reference to the United Nations premises in that country will impliedly include those of the I.T.U. and the U.P.U.⁶ Similarly, since the legal status and privileges and immunities of the I.L.O., the W.H.O., and the I.R.O. are virtually identical,⁷ mention of the I.L.O. premises will, unless otherwise stated, impliedly include those of the W.H.O. and the I.R.O.⁸ It may further be noted that the provisions of the Arrangement between the United Nations and Switzerland are identical, apart from

¹ See Liang, 'The Legal Status of the United Nations in the United States', in *International Law Quarterly*, 2 (1948), p. 577.

² Reference is also made to laws of the State of New York.

³ The only exception is in the case of the Arrangement between the United Nations and Switzerland, since the latter is a non-Member state. See Perrenoud, *Régime des Privilèges et Immunités des Missions diplomatiques étrangères et des Organisations internationales en Suisse* (1949), p. 90, n. 2.

⁴ E.g. Article 105 of the Charter, para. 1 of which reads as follows: 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.' Cf. Perrenoud, *op. cit.*, p. 56.

⁵ E.g. Articles of Agreement of the Fund, Article IX, and Articles of Agreement of the Bank, Article VII: see p. 92 *supra*.

⁶ See Perrenoud, *op. cit.*, p. 103.

⁷ It may be noted that the I.L.O., the W.H.O., and the I.R.O. Agreements each provide that 'in so far as they are not modified by the present Agreement, the *Modus vivendi* of 1921 and 1926 and the supplementary arrangements concluded between the Federal Political Department and the League of Nations shall continue to apply *mutatis mutandis*'. It would appear that this provision is mainly of a residuary nature with respect to the matters covered in the present article. It is interesting to note that there is no similar provision in the United Nations Arrangement, such absence being an indication of the fact that the United Nations has not inherited the precise legal status of the League of Nations in Switzerland.

⁸ See Perrenoud, *op. cit.*, p. 97.

their express application to Switzerland, with those of the Convention on the Privileges and Immunities of the United Nations,¹ with the exception of slight modifications in Article 1 and in Sections 5 and 27, which are, however, not relevant for the present purposes. Mention will not be made of this Convention, nor of the Convention on the Privileges and Immunities of the Specialized Agencies,² as, at the present time, the United States has not acceded to the former,³ and none of the other host states have acceded to the latter.⁴

II. *Assimilation of the legal status of the Organizations to that of diplomatic missions*

The assimilation of the legal status of the Organizations in the states where their Headquarters are located to that of diplomatic missions accredited to such states is not such an illogical and far-reaching step as it might seem.⁵ The privileges and immunities granted traditionally to diplomatic missions are largely based on the conception that such missions must, in all respects, be free to carry out their tasks in the fullest independence. That an equal independence is essential for the fulfilment by the Organizations of their purposes will be universally agreed. The criterion which has played a dominant role in the development and application of the régime of diplomatic privileges and immunities under customary international law, is that of necessity. Moreover, it has been clear from the very birth of the Organizations that the privileges and immunities with which they should be endowed should be those which are *necessary* for the maintenance of their independent status and the execution of their functions under their respective constituent instruments. In the words of an authority on international institutions: 'It is also necessary to accord [the] . . . Organizations the practical facilities necessary for the efficient conduct of their official business.'⁶ It follows that, in order to achieve their respective purposes, diplomatic missions and the Organizations should in essence possess the

¹ Adopted by the General Assembly on 13 February 1946: *U.N.T.S.*, vol. i, p. 15.

² Adopted by the General Assembly on 21 November 1947: *U.N.T.S.*, vol. xxxiii, p. 261.

³ The Convention, by virtue of its s. 31, is open to accession only by Member states of the United Nations. Switzerland can therefore not accede.

⁴ It may be noted that s. 39 of the Convention on the Privileges and Immunities of the Specialized Agencies provides, *inter alia*, that it 'shall in no way limit or prejudice the privileges and immunities which have been, or may hereafter be, accorded by any State to any specialized agency by reason of the location in the territory of that State of its headquarters or regional offices'.

⁵ Cf. Parry, 'International Government and Diplomatic Privileges', in *Modern Law Review*, 10 (1947), pp. 97-121.

⁶ Jenks, 'The Legal Personality of International Organizations', in this *Year Book*, 22 (1945), pp. 11-72, at p. 58.

same legal relationship, *vis-à-vis* the receiving¹ or host states. It is noteworthy that this fact has found explicit recognition in the I.L.O. Agreement, Article 3 of which reads as follows:

'The International Labour Organization enjoys the immunities known in international law as diplomatic immunities.'

Likewise Section 2, paragraph (b) of U.S. Public Law 291 provides, *inter alia*:

'International Organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process *as is enjoyed by foreign governments . . .*' (italics added).

The various instruments which govern the legal status of the Organizations have all been drawn up with much care and only after considerable discussion. However, it will be found that on some matters relating to the premises, with which this article is solely concerned, there are lacking express provisions in these instruments. In such cases it is submitted, in view of the justifiable assimilation of the legal status of the Organizations to that of diplomatic missions, that the law relating to the premises of the latter will be applicable to those of the former. The customary² and conventional³ international law governing the status of diplomatic premises will therefore be discussed. However, this principle will only strictly apply where the Agreements are actually silent. Naturally, where there is an inconsistency between the provisions set out therein and the rule of customary international law, the former will prevail. At the same time it may be suggested, in the light of the treatment accorded by Switzerland to the I.L.O., that there should be a minimum international standard with regard to the privileges and immunities of the Organizations corresponding in the main to the principles of customary international law applicable to diplomatic missions, and that all host states should respect the inherent right of the Organizations to such a standard. It may be remarked that it is in the interest of such states to do so, because otherwise they will necessarily

¹ The term 'receiving state' is used throughout this article with reference to a state to which diplomatic missions are accredited, and in contrast to the term 'host state' which is used with reference to a state in whose territory the Headquarters of an Organization is located.

² *The Harvard Draft Convention on Diplomatic Privileges and Immunities* (hereinafter cited and referred to as the *Harvard Draft*), prepared by the Research in International Law, Harvard Law School, Cambridge, Mass., 1932, and the drafts by other eminent authorities set forth in its appendixes must be considered as constituting statements of customary law.

³ There is very little conventional law in the field of diplomatic privileges and immunities and probably the only example of this source of international law is the Convention on Diplomatic Officers, adopted at Havana, 20 February 1928, by the Sixth International Conference of American States. As of 1 March 1951, twelve American states, not including the United States, had ratified this Convention. For text see Hudson, *International Legislation*, vol. iv, p. 2385. See, for a general statement on this point, *Survey of International Law in relation to the work of codification of the International Law Commission*, Memorandum submitted by the Secretary-General, U.N. Doc. A/CN. 4/1, Rev. 1, pp. 53-54.

be increasing the difficulty of the task of an Organization in carrying out its functions, and also defeating their own purposes, since it is the practice for a host state to be a member of an Organization whose Headquarters is located in its territory.

Thus it may be considered that recourse may be legitimately made to the appropriate rule of customary international law, where there is no governing provision on a particular matter in the legal instruments regulating the status of the premises of an Organization.

III. *Applicability of local law within the premises*

It is proposed to discuss first the matter of the application of the laws of the host state within the premises of the Organizations, since it is very relevant to the question of their legal status. With regard to the premises of diplomatic missions, it is doubtful whether customary international law recognizes that the territorial laws of the receiving state do not apply therein, since otherwise the implication of the extritoriality of the premises would necessarily arise. The question of extritoriality, despite its honourable antecedents, has long served to confuse the law relating to diplomatic privileges and immunities. The fiction maintained by Grotius and later authorities¹ that ambassadors are outside the limits of the country to which they are accredited² is not supported by publicists and eminent modern writers on international law.³ A clear statement upon the doctrine and use of the term is to be found in the Dena Sub-Committee Report on Diplomatic Privileges and Immunities to the Council of the League of Nations in 1927:

'It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of a State X are on territory which is foreign from the point of view of the State in question. There are sound practical as well as theoretical reasons for abandoning the term "ex-territoriality", for the mere employment of this unfortunate expression is liable to lead to errors and to legal consequences which are absolutely inadmissible.'⁴

¹ See Resolution of the Institute of International Law, Cambridge Session 1895-6 (hereinafter cited as *Cambridge Draft*), set out in Appendix 3 to *Harvard Draft*, loc. cit., p. 162; but cf. Resolution adopted by the Institute on 18 October 1929 in New York, in Appendix 11 to *Harvard Draft*, loc. cit., p. 186.

² See generally Adair, *The Extritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929).

³ See Sir Cecil Hurst in *Hague Recueil des Cours*, 1926 (ii), p. 146, where he says with reference to the fiction of extritoriality: 'A vrai dire, cette fiction, qui a pu être utile pour assurer la compréhension de la nature et de l'étendue des immunités diplomatiques, n'est qu'une fiction, et si on la poussait à son aboutissement logique, elle pourrait donner lieu à de graves difficultés, voire même à de véritables dangers.'

⁴ League of Nations Doc. C.196, M.70, 1927, V., p. 79, cited with approval in *Harvard Draft*, loc. cit., p. 51.

Nevertheless, it may still be a useful term when employed in a residuary sense as denoting the ensemble of privileges and immunities.¹

Thus, it would appear that although international law exempts members of diplomatic missions from the jurisdiction of the courts of the state to which they are accredited,² nevertheless it does not require that the laws of the receiving state shall be inapplicable within the premises of diplomatic missions on the ground that such premises are situated outside the territory of the state.³ On the contrary, national courts have consistently upheld the principle that criminal acts done within diplomatic premises are still acts done within the territory of the receiving state, and that consequently the laws of the latter are fully applicable thereto.⁴ The same may be said of any tortious acts so committed. With regard to private contracts entered into within diplomatic premises, these generally may equally be considered as subject to the law of the receiving state.⁵ However, there may be some which, having both their *locus contractus* and *locus solutionis* mainly, but not necessarily exclusively, within such premises, may more properly be considered as subject to the law of the state sending the diplomatic mission. With respect to the Organizations, it may be asserted that no legal significance can be attached to such phrases as 'international enclave' or 'international territory'. In the same way as diplomatic premises cannot be considered as part of the territory of the sending state, neither can the premises of the Organizations be considered as situated otherwise than in the territory of the host state. However, in dealing with this question of the application of the local law, the relevant provisions in the various Agreements merit considerable attention.

In the United Nations Agreement with the United States, it is provided in Section 7 (b) that 'the federal, state and local law of the United States shall apply within the headquarters district . . . except as otherwise provided in this agreement or in the General Convention'.⁶ The exception clause refers to the extremely important and unique provisions contained in Section 8, which grant the United Nations 'the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions', and further stipulate that 'No federal, state or local law or regulation of the United States which is inconsistent with a regulation of

¹ See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), Part III, chap. ii, §§ 386-96; Verdross, *Völkerrecht* (1950), p. 231.

² See Article 19 of the *Harvard Draft*.

³ *Harvard Draft*, loc. cit., p. 66.

⁴ See, for some decisions of national courts in cases concerning crimes committed within diplomatic premises, Oppenheim, op. cit., p. 711, n. 3, and also *R. v. Kent*, 57 T.L.R. 307.

⁵ See Hackworth, *Digest of International Law*, vol. iv (1942), p. 565.

⁶ The term 'General Convention' is used in this Agreement to mean the Convention on the Privileges and Immunities of the United Nations (s. 1 (c)).

the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district'.¹

It will be observed that, although the granting of such a power to an international Organization by a host state is unprecedented, the power is limited by three conditions, namely, that the regulations must be 'for the purpose of establishing' within the Headquarters District 'conditions in all respects necessary for the full execution' of the functions of the United Nations; that they can only be made 'to enable the United Nations at its Headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfil its purposes';² and that they are only to apply within the Headquarters District. However, this last limitation does not exclude the *power* to make regulations in respect of transactions having *situs*, but not necessarily to be performed, within the premises. Generally, in practice it would appear that the power under this section would normally be exercised in matters of an administrative nature,³ but clearly it is not restricted to such matters.

It has already been seen that some transactions taking place within the premises of a diplomatic mission may, having regard to their nature, be considered as governed by internal law, namely, the law of the state sending the mission. This may be said to be true *mutatis mutandis* of the Organizations, and even of those whose Headquarters Agreements contain express provisions regarding the application of the local law within the premises, namely, the United Nations and the F.A.O. This will be so with respect to such transactions as contracts made between the Organizations and their staff, and matters arising therefrom, concerning which it may be presumed local law was not intended to apply. Thus in the case of the United Nations, the validity of such internal law is independent of the existence of any regulation made under Section 8 and is subject in the first place, and in general only, to the jurisdiction of the Administrative Tribunal instituted by the General Assembly.

Subject to these considerations, and excluding transactions such as an international agreement between the United Nations and a Member state, which would be governed by international law, it is thought that, although the *locus contracti* of transactions made within the premises, and the *locus delicti* of torts committed therein, is indeed the United States, the law

¹ The section also provides that any dispute between the United Nations and the United States as to whether a regulation of the former is authorized thereby, or as to whether a federal, state, or local law or regulation is inconsistent therewith, shall be settled by the methods of arbitration set out in s. 21 of the Agreement.

² S. 27 states that this is the primary purpose of the Agreement, whose terms are to be construed in the light thereof.

³ See paras. 4 and 5 of *Report of the Secretary-General to the Fifth Session of the General Assembly*, U.N. Doc. A/1409. Thus, Regulation No. 1 is entitled 'United Nations Social Security System': *U.N. Journal*, No. 42.

applicable thereto will depend upon the existence of a regulation. Thus, if the United Nations deems it necessary to 'contract out' of the provisions of a local law, Section 8 provides the authority and power to do so, and the local courts in dealing with cases arising out of transactions taking place within the premises will be bound by Section 7 (d) to take them 'into account'.

With regard to any act committed within the premises which constitutes a crime under the law of the host state, whether it be a petty offence or one involving moral turpitude, it would appear that such act would be as much subject to the jurisdiction of the courts of the host state as any other act committed within its territory.¹ Thus it is clear from the provisions of Section 10 that the criminal jurisdiction of the United Nations, in so far as it may be said to exist at all, is limited to expelling and excluding persons from the Headquarters District for the violation of a regulation. This section further states that such a violation will only be punishable under local law in such cases as where it also amounts to an infringement of such law, by virtue either of the fact that the act concerned is a 'concurrent crime', or of the incorporation into local law of the provisions of the particular regulation.²

The F.A.O. Agreement is the only other one to contain a provision dealing with the application of the local law. Thus Section 6 (b) states that the local laws shall apply within the premises, and Section 6 (c) that the local courts shall have jurisdiction over the acts and transactions taking place therein 'as provided in applicable laws, except as otherwise provided in this agreement'. It is difficult to appreciate the legal effect of this exception clause, since there are no provisions in the Agreement granting to the F.A.O. law-making powers analogous to those possessed by the United Nations referred to above, although, under Section 6 (a), the Italian Government 'recognizes the extritoriality of the Headquarters seat which shall be under the control and authority of the F.A.O. as provided in this agreement'. However, the term 'extritoriality' must be presumed to have been used in a residuary sense, since to interpret it otherwise would be to nullify the effect of Section 6 (b). The result would appear to be that crimes,³

¹ This follows from the provisions of s. 7 (c) of the Agreement and, as such, may be said to be in accord with the rule of customary international law. With regard to the matter of the consent of the Secretary-General to permit the police to enter the premises to investigate any alleged criminal matter or cause, see p. 104, *post*.

² An example of the latter might be if a regulation laid down special traffic rules for the driving of motor-cars within the premises. In order for such rules to be enforceable and subject to penalties under local law, they would have to be expressly incorporated therein.

³ In the hypothetical instance of a crime being committed by an official of the F.A.O. possessing diplomatic immunity, it would follow that such immunity would need to be waived by the competent authority within the Organization before the local courts were able to exercise jurisdiction. The whole question of waiver is, however, beyond the scope of the present article.

torts, and transactions taking place within the premises will all be governed by local law to the full extent of its existence. Where there are no provisions in local law, such as in matters concerning the legal relationship between the Organization and the staff, the internal law of the F.A.O. will apply.

With regard to the I.L.O. Agreement the following provision is to be found:

'Exterritoriality of the grounds and buildings

'The Swiss Federal Council recognizes the extrterritoriality of the grounds and buildings of the International Labour Organization and of all buildings occupied by it in connection with meetings of the International Labour Conference or any other meeting convened in Switzerland by the International Labour Organization.'¹

This use of the term 'extrterritoriality' must be interpreted in the light of pronouncements by the competent Swiss authorities to the effect that what they understand by it is the totality of diplomatic privileges and immunities.² Thus this may be another instance of where it may usefully serve in a residual sense. However, there can be no question of considering that transactions taking place within the premises of the I.L.O. have their *situs* outside Swiss territory. Nevertheless, in a similar manner to the United Nations and the F.A.O., a definite class of transactions entered into within the premises, such as those affecting the internal status of the staff, may be deemed to be exclusively governed by the internal law of the I.L.O., namely, the law emanating from International Labour Conferences and from the Governing Body. Equally, in accord with the régime applicable within the premises of the F.A.O. with respect to crimes committed therein, crimes committed within the premises of the I.L.O., notwithstanding the grant of 'extrterritoriality', must be considered as subject to the jurisdiction of the Swiss courts. Neither the United Nations Arrangement with Switzerland, nor the U.N.E.S.C.O. Agreement, nor the I.C.A.O. Agreement contains any provision relating to this subject. Moreover, with regard to the Fund and the Bank, their constituent instruments and U.S. Public Law 291 are equally silent. In the absence of any provisions it must be presumed that the law of the host state applies generally within the premises of these Organizations, except to the extent that it does not relate to certain types of transactions taking place therein, which are consequently governed by internal law.

¹ Article 4.

² Perrenoud, *op. cit.*, pp. 56-57 and 134-5. It may be mentioned that in a case before the Cantonal Court of Geneva in 1927 the meaning of the term 'extrterritoriality' as applied to certain high officials of the I.L.O. in the *Modus vivendi* of 1921 was discussed. See Secrétan, 'Problèmes de droit diplomatique devant le Juge et le Gouvernement suisses', in *Extrait des Mélanges François Guisan, Recueil de travaux publié par la Faculté de droit de l'Université de Lausanne*, 1950.

IV. *The inviolability of the premises*1. *The use of the term 'inviolability'*

The term 'inviolability' is used by certain writers to denote the ensemble of privileges and immunities,¹ and clearly its importance when used in this residual sense should not be overlooked. Traditionally, it may also be said to express the principle that the authorities of a receiving state have no right of entry into diplomatic premises. On the other hand, some authorities prefer to ignore its existence;² however, in its application to the premises of the Organizations it has been found useful to employ it, unless otherwise indicated, as a comprehensive concept. Thus, in so far as it may be applied in this manner, it is thought to be most commonly exemplified by the following specific immunities, certain of which are embraced by the term in the various Headquarters Agreements:

- (a) The premises³ and the property⁴ of the Organization located therein shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action.
- (b) The authorities of the host state shall not enter the premises, except with the consent of the Organization, provided, however, that the Organization shall prevent the premises from being used as a place of asylum.⁵
- (c) The host state shall exercise due diligence to ensure the protection of the premises.⁶
- (d) The premises⁷ shall be exempt from all taxes, except those which are, in fact, no more than charges for public utility services.

2. *The premises and the property of the Organization located therein, shall be immune from search . . .*

It cannot be doubted that this immunity, which is an expression of the so-called *franchise de l'hôtel*, is an accepted part of the customary law relating to premises of diplomatic missions. Indeed, if it were not so, there would be little basis for many of the other immunities. That no act of

¹ See Scelle, *Manuel de droit international public* (1948), p. 547; Fauchille, *Traité de droit international* (1926), vol. i, Part 3, p. 64.

² Thus the term is not used in the *Harvard Draft*.

³ The term 'premises' as used here means the immovables of the Organization located within the Headquarters Area.

⁴ The term 'property' as used here means movables.

⁵ The term 'asylum' is used throughout this article in the sense of 'diplomatic' asylum in contradistinction to 'territorial' asylum: see Fitzmaurice in this *Year Book*, 27 (1950), p. 31.

⁶ This is merely the expression of the positive duty upon the host state corresponding to the right enjoyed by the Organization to immunity from disturbance.

⁷ See n. 3 above.

jurisdiction or administration of the receiving state, of the nature specified in this immunity, can take place within or relate to diplomatic premises, must be regarded as fundamental.¹ Thus, Article 4, paragraph 2, of the *Harvard Draft* provides:

‘A receiving state shall exempt from any form of attachment or execution the interest of a sending state in movable or immovable property owned, leased, or possessed by the sending state for the purpose of its mission.’²

Moreover, archives considered as movables situated within the premises come under the scope of this immunity, since it is an essential part of diplomatic intercourse that the receiving state respect the sanctity of all archives and other documents belonging to missions accredited to it. This is recognized in Article 5 of the *Harvard Draft*, which provides:

‘A receiving state shall protect the archives of a mission from any violation, and shall safeguard their confidential character, wherever such archives may be located within the territory of the receiving state, provided that notification of their location has been previously given to the receiving state.’³

The various Headquarters Agreements are equally explicit with regard to this aspect of immunity. Thus, the United Nations Arrangement with Switzerland provides with respect to the property⁴ and assets of the Organization in that country that they ‘shall be immune from search, requisition, confiscation, expropriation, and any other form of interference, whether by executive, administrative, judicial, or legislative action’.⁵ The archives are similarly protected: ‘The archives of the United Nations, and in general all documents belonging to it or held by it in Switzerland, shall be inviolable.’⁶ The I.L.O. Agreement contains virtually identical provisions with regard to its property and assets (Article 6, paragraph 2), and archives (Article 8); likewise, the F.A.O. Agreement in Sections 17 and 18, respectively. With regard to the United Nations Headquarters in the

¹ See *Immunity of Legation Buildings (Czechoslovakia) Case: Annual Digest of Public International Law Cases, 1927-8, Case No. 251.*

² See also Article 23 of the *Harvard Draft Convention on Competence of Courts as regard to Foreign States*, prepared by the Research in International Law, Harvard Law School, Cambridge, Mass., 1932, p. 700.

³ See also Article 14 (d) of the Havana Convention on Diplomatic Officers. See further, Perrenoud, op. cit., pp. 137-8, for an account of the scrupulous treatment accorded by the Swiss Government to the archives of diplomatic missions.

⁴ With regard to the term ‘property’ as used in this Arrangement, it may be noted that, with respect to immovables, Article 2, para. 2, of the Agreement between the United Nations and the Swiss Confederation on the Ariana Site, signed at Berne on 11 June 1946 and at New York on 1 July 1946 (*U.N.T.S.*, vol. i, p. 153), provides as follows: ‘Buildings, as well as those already erected, shall be the property of the United Nations, and the land on which they are erected, including the soil surrounding them over a width of 100 metres, shall be subject to a transferable and exclusive real right of user of the surface by the United Nations.’

⁵ S. 2.

⁶ S. 3. This is a common form of usage of the term ‘inviolable’ in the sense of a specific immunity from interference, which is found in the relevant clauses of all the Agreements. As such, it may be regarded as a negative right possessed by the Organizations, and may be compared with the positive duty imposed upon the receiving state by Article 5 of the *Harvard Draft*.

United States, it is provided by Section 2, paragraph (c), of U.S. Public Law 291 that the property and assets of the Organization shall be immune from 'search' and 'confiscation', and that 'the archives shall be inviolable'. Further, Section 9 (a) of the Agreement provides that 'the headquarters district shall be inviolable'. Thus, whilst it is conceivable that the exercise of various kinds of 'interference' might not take the form of 'search' or 'confiscation', it is difficult to see how any such action taken against the United Nations could possibly be regarded as other than totally irreconcilable with the actual immunity which has been accorded to the Organization. Furthermore, the United Nations is always in a position to base a claim to full immunity, should the occasion ever arise, on Article 105 of the Charter, since all legal instruments regulating its status or that of its premises must be read in the light of that article.

The Fund and the Bank are afforded the same protection as the United Nations by Section 2, paragraph (c), of U.S. Public Law 291. Additionally, however, Article IX, Section 4, and Article VII, Section 4, of their respective constituent instruments set out the immunity with regard to their property and assets in a similarly comprehensive manner as is specified in the United Nations Arrangement with Switzerland.¹ In the U.N.E.S.C.O. Agreement the archives are declared inviolable in Article 3, but the immunity as applied to the property (movables and immovables) has a form of 'escape clause':

'Les biens appartenant à l'Organisation sont insaisissables. Ils ne peuvent faire l'objet de mesures de réquisition.

'Ils ne peuvent également faire l'objet de mesures d'expropriation si ce n'est pour cause d'utilité publique et après accord entre l'Organisation et le Gouvernement français.'²

Finally, the I.C.A.O. Agreement provides the immunity for the property and assets in Article II, Section 4 (b), subject to the 'reasonable application of fire protection regulations', and also for the archives (Section 5).

3. *The authorities of the host state shall not enter the premises, except with the consent of the Organization. . . .*

Customary international law as evidenced by the practice of states implicitly recognizes that the so-called *franchise de l'hôtel* comprehends the rule that the authorities of a receiving state have no right of entry into the premises of a diplomatic mission, without the consent of the Head of

¹ Thus Article IX, s. 4, of the Articles of Agreement of the Fund reads as follows: 'Property and assets of the Fund, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation, or any other form of seizure by executive or legislative action.'

² Article 4.

Mission or his representative.¹ This rule has been traditionally expressed in the terminology of international law by the term 'inviolability', and it would appear from the context of the relevant clauses in all the Agreements that the latter has been used in this sense therein. This is the sense, moreover, in which it should be construed, following the principle that particular international law must be interpreted by reference to customary international law.² A corollary of this general rule of international law is that the service of legal process may not take place within diplomatic premises.³ The rule is, however, subject to the following *caveat*, namely, that consent to entry may be implied in cases involving act of God, *force majeure*, and bona fide belief on the part of the authorities that a crime of violence is about to be committed within the premises.⁴ Further, there is authority for the view that consent is not necessary where the occasion is one of self-defence for the receiving state.⁵

Section 9 (a) of the United Nations Agreement with the United States, dealing with the entry of authorities of the latter, expresses the above rule of customary international law as follows:

'The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General.'

Where a disturbance has taken place within the premises, Section 16 (b) allows for the entry of the police 'if so requested by the Secretary-General'.

With respect to implied consent, this would presumably apply in case of act of God and *force majeure*. With regard to a bona fide belief on the part of the local authorities that a crime of violence is about to take place within the premises, it is thought that this would be a suitable matter to regulate in accordance with the provisions of Section 9 (a) whereby consent would be given in advance to entry on all occasions of such circumstances arising, subject to conditions agreed by the Secretary-General.

As for the view that the rule of customary international law regarding consent to entry upon diplomatic premises does not apply where the receiving state's self-defence is in question, it is evident that to allow a host state the advantage of such an exception, particularly if the self-determined

¹ *Harvard Draft*, Article 3, para. 1. See also Article 16 of the Havana Convention on Diplomatic Officers.

² See Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), p. 13.

³ *Harvard Draft*, loc. cit., p. 55.

⁴ *Harvard Draft*, loc. cit., p. 52.

⁵ Article 6 of the *Cambridge Draft* of the Institute of International Law.

existence of a threat to the latter's national security interests were the only ground, would be inherently dangerous for the independence of an Organization. Nevertheless, a number of the Agreements, namely, the I.L.O. Agreement, the F.A.O. Agreement, the U.N.E.S.C.O. Agreement, and the I.C.A.O. Agreement, contain provisions permitting the respective host states to take any necessary precautions to safeguard their national security.¹ However, there is an express proviso in each Agreement, except the I.C.A.O. Agreement, to the effect that any measures taken should be without prejudice to the interests of the Organization concerned.

In the I.L.O. Agreement the relevant provision is somewhat shorter but just as explicit:

'Inviolability of grounds and buildings.'

'The grounds and buildings of the International Labour Organization are inviolable. No agent of the Swiss public authority may enter them without the express consent of the International Labour Organization.'²

The difference between this provision and Section 9 (a) of the United Nations Agreement referred to above would appear to be merely a question of degree. The former seems to require express consent on the occasion of each entry by the local authorities, whereas, under the latter, there is an implication that the conditions of entry will be agreed to and negotiated in advance, in which procedure there may be some practical advantage. The I.L.O. Agreement contains no special reference to the serving of legal process within the premises, but this must be deemed to be excluded by the terms of Article 7 cited above.

With regard to implied consent to entry in case of act of God and *force majeure*, the same considerations governing entry into the premises of the United Nations in New York may be said to be applicable to the I.L.O. and the other Organizations. However, the matter is not so clear with respect to a bona fide belief on the part of the local authorities that a crime of violence is about to take place within the premises, since there is no clause in the I.L.O. or other Agreements corresponding to Section 9 (a) of the United Nations Agreement dealing with the prior negotiation of such matters. This fact is immaterial in itself, since each Organization can easily initiate such discussions and come to understandings with the respective local authorities on the procedure to be followed in given eventualities.

The provisions of sections 7 (a) and 8 (b) of the F.A.O. Agreement are virtually identical with those of Sections 9 (a) and 16 (b) of the United Nations Agreement referred to above, but the relevant provisions in the other agreements are less comprehensive in form. Thus, the United

¹ I.L.O. Agreement, Article 25; F.A.O. Agreement, Article XVI, s. 33, para. (c); U.N.E.S.C.O. Agreement, Article 16; I.C.A.O. Agreement, Article IX, s. 40.

² Article 7. See Perrenoud, *op. cit.*, p. 137.

Nations Arrangement with Switzerland simply provides: 'The premises of the United Nations shall be inviolable.'¹ However, it cannot be doubted that this provision has the same legal effect as Article 7 of the I.L.O. Agreement, since, as has been shown above, the sense of the term 'inviolability' in this context is that the consent of the Organization is necessary before the authorities of the host state may enter the premises. In the words of a recent Swiss writer:

'L'immunité locale est toujours reconnue en faveur des *organisations internationales* jouissant des privilèges et immunités en Suisse. Elle l'était expressément pour la Société des Nations; elle l'est aujourd'hui également en faveur de l'Organisation des Nations Unies, . . .'²

It may therefore be considered that in similar circumstances the Secretary-General of the United Nations would invoke the procedure followed by the Secretary-General of the League of Nations, when the Geneva police were requested to enter the Palais des Nations in the *cause célèbre* of *Ivan de Justh* after the latter had assaulted the Hungarian representative to the League.³ Such procedure is expressly envisaged in the U.N.E.S.C.O. Agreement, where paragraph 2 of Article 18 provides for the entry of the police 'sur la demande du Directeur général', in case of internal disturbance. Article 3 of this Agreement states that the premises shall be 'inviolable', and Section 4 (a) of the I.C.A.O. Agreement does likewise. With regard to the Fund and the Bank, there is no provision in either U.S. Public Law 291 or in their constituent instruments to the effect that their premises are inviolable, or that the authorities of the United States shall have no right of entry. This would appear therefore to be a case for the application to such premises of this rule of customary international law.

4. . . . *the Organization shall prevent the premises from being used as a place of asylum.*

It is generally recognized that this immunity of diplomatic premises does not extend to permitting them to be used as a place of asylum. In the words of a learned writer, 'no right of asylum can be deduced from the position of diplomatic representatives in international law'.⁴ Moreover, state practice supports the view that no customary international law on the subject of asylum has come into being.⁵ In fact, Article

¹ S. 2.

² Perrenoud, *op. cit.*, p. 136. He uses the term *immunité locale* synonymously with *franchise de l'hôtel*: *op. cit.*, p. 35.

³ *Ibid.*, p. 134. See also Hill, *Immunities and Privileges of International Officials* (1927), pp. 28, 34.

⁴ Miss Felice Morgenstern, '“Extra-territorial” Asylum', in this *Year Book*, 25 (1948), pp. 236-61, at p. 239.

⁵ *Ibid.*, p. 242. Cf. Resolutions on Asylum in Public International Law adopted by the Institute of International Law at its Bath Session, September 1950, printed in *American Journal of International Law*, 45 (1951), Official Documents, p. 15.

6 of the *Harvard Draft* places an obligation upon the Head of the Mission not to allow the premises to be used as a place of asylum. However, a so-called right of temporary refuge based upon humanitarian intervention is generally recognized.¹ On the other hand, the right of asylum for 'political offenders'² is recognized by custom³ and convention⁴ in Latin-America, though it is probably improper to refer to the existence of customary or conventional Latin-American international law on the subject.⁵

None of the Headquarters Agreements or other instruments regulating the legal status of the premises of the Organizations contains any provisions with regard to the question of asylum (as distinguished from temporary refuge). It would follow that this is a question of where, by process of assimilation, recourse may be had legitimately to the legal position governing diplomatic premises. Consequently, it may be concluded that no right of asylum within the premises of the Organizations can be said to exist. Having regard to the explosive nature of the institution of asylum, such a conclusion would appear to be correct not only legally but also politically. Some of the Headquarters Agreements, however, contain a provision relating to the taking of refuge on the premises, devolving upon the Organizations the express obligation not to allow them to be used for such purposes.⁶ Thus, Section 9 (b) of the United Nations Agreement with the United States provides:

'Without prejudice to the provisions of the General Convention or Article IV⁷ of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavouring to avoid service of legal process.'

It may be observed that this section, in its application to the types of persons who might wish to enter the premises, would appear in practice to be an exclusive classification of all persons not entitled to *diplomatic* privileges and immunities, and clearly includes officials of the Organization,

¹ *Ibid.*, p. 246. See also *Harvard Draft*, p. 65.

² See Article 2 of the Convention on Asylum, adopted at Havana on 20 February 1928 by the Sixth International Conference of American States. Up to 1 March 1951 eleven Latin-American states had ratified this Convention. For the text see Hudson, *op. cit.*, vol. iv, p. 2412. It may be noted that Section 17 of the Havana Convention on Diplomatic Officers provides that: 'Diplomatic officers are obliged to deliver to the competent local authority that requests it any persons accused or condemned for *ordinary crimes*, who may have taken refuge in the mission.' (Italics added.)

³ See the Dissenting Opinion by Judge Azevedo in the *Asylum* case between Colombia and Peru: *International Court of Justice Reports*, 1950, pp. 332-58.

⁴ See generally the Judgment of the Court in the *Asylum* case, *I.C.J. Reports*, 1950, pp. 266-88, and in particular the Dissenting Opinion by Judge Alvarez at pp. 290-302.

⁵ See Miss Morgenstern, 'Diplomatic Asylum', in *Law Quarterly Review*, 67 (1951), pp. 362-82.

⁶ Cf. Article 6 of the *Harvard Draft*, with regard to asylum.

⁷ Article IV deals with communications and transit to or from the Headquarters District.

in cases not covered by their respective immunities under the Convention on the Privileges and Immunities of the United Nations, U.S. Public Law 291, and the Agreement itself. Even in the extreme hypothetical case of an individual fleeing from a mob, the Secretary-General is nowhere empowered to exercise the right of humanitarian intervention.

The F.A.O. Agreement contains virtually identical provisions.¹ The I.C.A.O. Agreement differs only as to the persons to whom refuge must not be given by the Organization, in specifying 'persons who are avoiding arrest or . . . persons who are endeavouring to avoid service or execution of legal process'.² It may be considered, however, that this clause would include those persons required by the Government of Canada for extradition to another country, and that therefore the legal position is the same as obtains under the United Nations Agreement with the United States.

In the U.N.E.S.C.O. Agreement, Article 3 provides, *inter alia*:

'Toutefois, l'Organisation ne permettra pas que l'immeuble serve de refuge à une personne contre laquelle un mandat de justice aura été lancé par les autorités françaises.'

It is thought that the term 'mandat de justice' cannot be given a precise legal definition and that it only refers to criminal process. Thus it would appear that some of the persons in the United Nations Agreement referred to above, namely, those 'who are endeavouring to avoid service of legal process', in so far as this relates to civil process, are not included. Moreover, it is at least arguable in theory that a person required by the Government of France for extradition to another country would also be excluded. None of the Agreements with Switzerland contains a provision on the subject of the right of temporary refuge. However, Switzerland recognizes the right with regard to diplomatic premises.³ Therefore, applying the principle of assimilation of legal status, it may be considered that the Swiss Government would also recognize the justifiability of the exercise of the right with respect to the premises of the Organizations at present located in Switzerland. At the same time, it may be added, having regard to the delicate nature of the question involved, that it is one which must also be governed by the purposes and principles of the constituent instruments of the Organizations concerned. Finally, with regard to the Fund and the Bank there is no reference in U.S. Public Law 291 nor in their constituent instruments to the question of the right of temporary refuge. Thus, similarly, any conclusions upon the absence of specific provisions must take into account the overriding fact that all acts of the Organizations must be based upon the purposes and principles set out in their constituent instruments.

¹ Article III, s. 7 (b).

² Article II, s. 4 (c).

³ Perrenoud, *op. cit.*, pp. 135-6.

5. *The host state shall exercise due diligence to ensure the protection of the premises.*

The receiving state, under customary international law, is required to take all reasonable and necessary steps to ensure the protection of the premises of diplomatic missions. No duty is imposed upon the receiving state to guarantee absolute protection, but it is required, by the exercise of due diligence, not only to institute the appropriate measures to prevent entry into the premises by unauthorized persons, but also to prevent disturbances occurring outside the premises, and to provide generally for their protection.

Article 3, paragraph 2, of the *Harvard Draft* provides as follows:

'A receiving State shall protect the premises occupied or used by a mission, or occupied by a member of a mission, against any invasion or other act tending to disturb the peace or dignity of the mission or of the member of a mission; . . .'¹

This rule of customary international law is expressed as follows by Section 16 (a) of the United Nations Agreement with the United States:

'The appropriate American authorities shall exercise due diligence to ensure that the tranquility of the headquarters district is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its immediate vicinity and shall cause to be provided on the boundaries of the headquarters district such police protection as is required for these purposes.'

The first part of this section does not appear to offer too much difficulty with regard to its interpretation. However, it is thought that it is conceivable that the phrase 'disturbances in its immediate vicinity' might be construed in such a manner as to prevent the taking place of not otherwise unlawful assemblies, such as peaceful picketing, just outside the premises of the Organization. Clearly, the proper construction must be one which, whilst taking into account the necessity of ensuring that the work of the United Nations is in no way 'disturbed', is also compatible with the principle of freedom of assembly and meeting.

Article IV, Section 8 (a), of the F.A.O. Agreement contains almost identical provisions. Article 18, paragraph 1, of the U.N.E.S.C.O. Agreement casts a similar duty upon the host state. This is, however, phrased in a more absolute manner:

'Le Gouvernement français prendra les mesures de police nécessaires à la protection du siège de l'Organisation et au maintien de l'ordre dans son voisinage immédiat.'

There are no provisions in the Agreements with Switzerland on the subject of the protection of the premises. However, the Swiss Government recognized that the rule of customary international law in this respect extended to the premises of the League of Nations, on account of the

¹ See also *Harvard Draft*, pp. 56-57.

'inviolability' enjoyed by the latter under Article 7 of the Covenant.¹ Since, as has been seen already, the premises of all the Organizations which are at present located in Switzerland are also 'inviolable', and because of the presumption that in the absence of express provisions these will benefit from the same legal régime as was recognized by Switzerland to be applicable to the premises of the League of Nations, it may be considered that they, too, are entitled to the protection afforded by the rule of customary international law. Likewise, there are no provisions in the I.C.A.O. Agreement, nor in any of the instruments governing the legal status of the Fund and the Bank. However, it is submitted that, applying the principle of assimilation of legal status, the protection accorded to diplomatic premises under customary international law by a receiving state will be equally due to the premises of these Organizations.

6. *The premises shall be exempt from all taxes, except those which are, in fact, no more than charges for public utility services.*

It would probably be unjustified to maintain that customary international law prescribes the exemption of property taxes on premises owned by diplomatic missions. However, the evidence of international practice indicates that no state as a matter of comity 'undertakes to subject the property of another State used for diplomatic purposes to a property tax *stricto sensu*'.² Some states condition such exemption upon reciprocity.³

Reference may now be made to the practice of some of the receiving states concerned in the present article, with regard to the taxation of diplomatic premises. In the United States 'property in the District of Columbia owned by foreign governments for Embassy or Legation purposes is exempt from general and special assessments'. Also, property located there, and 'owned by an Ambassador or Minister and used for Embassy or Legation purposes is exempt from general taxes. . .'.⁴ It is interesting to note, however, that property owned by foreign governments and used by their permanent delegations to the United Nations for official purposes is not exempt at the present time from New York State Real Property Tax. With regard to Switzerland, the following statement is to be found in the

¹ Perrenoud, *op. cit.*, p. 109. This recognition is indicative of the fact that the term 'inviolability' carries with it more than one particular sense, and does truly embrace a number of specific immunities.

² *Harvard Draft*, *loc. cit.*, p. 57. It is not proposed to deal here with the matter of special assessments levied upon diplomatic premises from which, under international law and comity, there can be ascertained no general rule or evidence of exemption. See Hackworth, *op. cit.*, vol. iv, p. 580.

³ *Harvard Draft*, *loc. cit.*, pp. 60-61: see also Hyde, *International Law chiefly as interpreted and applied by the United States* (2nd rev. ed., 1947), vol. ii, p. 1276.

⁴ *Ibid.*, p. 1277.

Swiss reply of 29 December 1926 to the League of Nations questionnaire on Diplomatic Privileges and Immunities:

'The buildings used by diplomatic missions at Berne are exempted from tax as a purely exceptional measure, on a basis of reciprocity.'¹

Italy, on the basis of *comitas gentium*, exempts from tax diplomatic premises if they are the property of foreign states,² and in Canada it has been held by the Supreme Court that no rates can be levied on the properties owned and occupied by foreign governments.³

The *Harvard Draft* appears to grant a wider exemption. Thus, Article 4, paragraph 1, reads as follows:

'A receiving state shall not impose any taxes or charges, whether national or local, upon the interest of the sending state in movable⁴ or immovable property owned, leased, or possessed by the sending state for the purpose of its mission. . . .'⁵

It is doubtful from the examples given above whether the general practice of states supports the view that the exemption extends to property merely 'leased or possessed' by the sending state.⁶ The resolution adopted by the Institute of International Law in New York in 1929 was careful to exclude such extension:

'L'hôtel de la mission est exempt de tous impôts et taxes, sauf le cas où il ne serait la propriété, ni de l'agent, ni de l'État que celui-ci représente.'⁷

Nevertheless, it is clear that exemption enjoyed by diplomatic premises from property taxes does not generally extend to those which are, in fact, no more than charges for public utility services.⁸

The above practice of the host states in their relation to the premises of accredited diplomatic missions has been followed to a large extent in their treatment of the Organizations whose Headquarters are located in their territory. Thus, with regard to the Organizations whose Headquarters are located in the United States, namely, the United Nations, the Fund, and the

¹ League of Nations Doc. C.196, M.70, 1927, V., p. 246.

² See *Harvard Draft*, loc. cit., pp. 60-61.

³ *Matter of a Reference as to the Powers of the Corporation of the City of Ottawa, &c.: Annual Digest*, 1941-2, Case No. 106. *Per* Taschereau J.: 'I have come to the conclusion that practically in all the leading countries of the world it is a settled and accepted rule of International Law, that property belonging to a foreign Government, occupied by its accredited representative, cannot be assessed and taxed for state or municipal purposes.' (At p. 349.) Followed in *Yin-Tso Hsiung v. Toronto* (1950), 4 D.L.R. 209 (noted in *American Journal of International Law*, 45 (1951), p. 595).

⁴ The matter of the exemption of the Organizations from taxes on movables, which involves questions of excise taxes and customs duties, has been omitted from this article on account of its irrelevancy.

⁵ See also Article 18, para. 2, of the Havana Convention on Diplomatic Officers.

⁶ See Hackworth, op. cit., p. 578; *Harvard Draft*, loc. cit., p. 61.

⁷ Article 19. Appendix 11 to *Harvard Draft*, loc. cit., p. 187. Cf. Hyde, op. cit., p. 1277, who indicates that it would be for the private owner to pay any levies made upon property leased to foreign governments.

⁸ *Harvard Draft*, loc. cit., p. 58.

Bank, Section 6 of U.S. Public Law 291 provides that 'International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories'. Since the Headquarters of both the Fund and the Bank are located within the District of Columbia, this is the only provision relevant to them. However, with respect to the United Nations, the State of New York has also provided that its premises shall be exempt from real property tax.¹ It may be observed that, in accordance with the generally prevailing practice with respect to diplomatic premises, none of these Organizations are exempted from charges for public utility services. Likewise, the United Nations Arrangement with Switzerland provides, *inter alia*, in Article II, Section 5 (a), that United Nations property shall be 'Exempt from all direct and indirect taxes, whether federal, cantonal or communal. It is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services.'

Article 10 of the I.L.O. Agreement contains a similar but more comprehensive provision, namely:

'The International Labour Organization is exonerated from direct and indirect taxes, federal, cantonal and communal on buildings of which it is the owner and which are occupied by its services as well as on its movable property, it being understood that the International Labour Organization does not claim exemption from charges corresponding to a service rendered by a public authority.'

The relevant provisions of the F.A.O. Agreement are even more precise and far-reaching; thus, Section 19 (a) in exempting the property of the F.A.O. from 'any form of direct taxation', enumerates, but without limitation by reason of the enumeration, the various taxes from which exemption is granted. Moreover, Section 19 (b) grants the F.A.O. the same exemption as is enjoyed by Italian governmental administrations in respect of '... consumption taxes on electric power for lighting, on gas for lighting and heating. . . .' It is difficult to appreciate the extent of this exemption, but its very existence is unique as regards the Organizations.

By contrast, the U.N.E.S.C.O. Agreement, in paragraph 1 of Article 6, merely states:

'L'Organisation est exonérée du versement de tout impôt direct. Toutefois, elle acquitte les taxes pour services rendus.'

With regard to the I.C.A.O. Agreement, the provisions of Article II, Section 6, are virtually identical with those of Section 5 (a) of the United Nations Arrangement with Switzerland, except that the exemption extends

¹ 59 McKinney's Consolidated Laws of New York Annotated, s. 4 (20).

to property 'owned *or*¹ occupied' by the I.C.A.O. This is the only example of such an extension, but it is in accord with the *Harvard Draft* exemption quoted above.

V. *Conclusions*

The provisions of the various Headquarters Agreements and other instruments regulating the legal status of the premises of the Organizations in the states where their Headquarters are located express mainly the rules of customary international law applicable to the premises of diplomatic missions. This fact is not surprising, seeing that the *rationale* of the immunities attaching to both kinds of premises is essentially to ensure that the functions of the missions and of the Organizations may be carried out in the fullest independence. Taking into account this fundamental consideration, the legal status of the premises of the Organizations may be legitimately assimilated to that of diplomatic premises, in cases where there are no express provisions governing the former. Moreover, it is submitted that when the immunities which become applicable in this way to the premises of the Organizations are regarded from the functional point of view, their necessity is clearly justifiable. On the other hand, whether the present legal status of their premises is satisfactory for all the Organizations is a question the answer to which will primarily be determined by experience. Finally, the fact is to be welcomed that the immunities of the premises of the various Organizations are themselves very largely on a similar basis. This may be attributed to the desire of the host states concerned not only to follow a common pattern but also to grant to the premises of the Organizations immunities based on the standard of those enjoyed by premises of diplomatic missions. Particular international law is thus being progressively created along the well-developed lines of the general international law relating to diplomatic privileges and immunities.

¹ Italics added.

THE ANGLO-NORWEGIAN FISHERIES CASE¹

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THE judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries* case will rank among the boldest and most important judgments pronounced by any international tribunal. It lays down rules of law which diverge fundamentally from those accepted by the majority of states at the Codification Conference on Territorial Waters held at The Hague in 1930. It formulates a new test of the legitimacy of claims to inland waters and thus necessarily touches the interests of every maritime state. It comes at a time when new maritime claims are being advanced in more than one connexion, and its implications may be felt outside the immediate sphere of inland waters.

The case concerned the validity as against the United Kingdom of the base-lines laid down in the Norwegian Royal Decree of 1935 for delimiting Norway's Zone of exclusive fisheries off her northern coasts. The portion of the coast covered by the Decree extends from the Norwegian-Russian border on the south shore of Varangerfjord northwards along the east coast of Finnmark to the North Cape and thence southwards along the west coast as far as Traena (66° 28' N.), a little to the south of the Vestfjord. The fishery limit is a line drawn four miles to seaward of straight base-lines which link forty-eight base-points selected from extreme points along the coast, either prominent headlands on the mainland or islands or rocks out at sea. (Some of the rocks are dry only at low tide.) These base-lines, which are illustrated² opposite, do not at any place follow the actual line of the shore but are wholly imaginary lines which are drawn across the sea and touch land only at the base-points. Whereas the coast to the west of the North Cape (base-points 12-48) has a fringe of countless islands known as the skjaergaard,³ the coast to the east of North Cape (base-points 1-12)

¹ *I.C.J. Reports*, 1951, p. 116. The following are the authorities more frequently referred to in the present article and, in brackets, the abbreviations by which they will be cited in future pages: *Rapport de la Commission de la Frontière des Eaux Territoriales* (1912) [1912 Report]; Raestad, *Kongensstrømme*, Translations of extracts in Annex 83 to the Norwegian Rejoinder [Raestad, Annex 83]; Fulton, *Sovereignty of the Sea* (1911) [Fulton]; three documents of the Conference on the Codification of International Law, relating to Territorial Waters, namely, *League of Nations Documents* C. 351, M. 145, 1930, V [Plenary Meetings], 74 M. 39, 1929, V [Bases of Discussion], C. 351 (b), M. 145 (b), 1930, V [Minutes of the Second Committee]; Gidel, *Le Droit international public de la mer*, vol. iii [Gidel, vol. iii]. See also Meyer, *The Extent of Jurisdiction in Coastal Waters* (1937).

² I am indebted to Commander R. H. Kennedy, O.B.E., R.N. (Retired), for this map of the 1935 line.

³ The scale of the map opposite is too small to show all the islets and rocks along the coast. skjaergaard means literally 'the rock rampart'.



is heavily indented with bays but does not possess an island fringe. On both coasts, however, the base-line passes from point to point *without anywhere following the tide-mark along the coast and frequently without touching the headlands of the individual bays*. The total length of the straight base-lines is about 600 miles and they vary in length from a few cables between closely adjacent islands to forty-four miles across great spaces of sea. Eighteen of the lines exceed fifteen miles in length.

The preamble of the 1935 Decree, by way of justifying its provisions, recited (1) 'the geographical conditions prevailing on the Norwegian coasts', (2) 'the vital interests of the inhabitants of the northernmost parts of the country', and (3) 'well-established national titles of right' with a particular reference to previous decrees of 1812, 1869, 1881, and 1889. The first two considerations, namely, the geographical and economic, can be stated briefly. The third, Norway's historic claim, requires a fuller treatment.

The geographical and economic facts

The coast covered by the 1935 Decree lies wholly within the Arctic Circle. It is mountainous, bleak, and largely barren. In the past, fishing has been the only source of livelihood of the sparse population. The coast, though by no means unique, is, as the Court said, 'very distinctive' (p. 127):

'Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the "skjaergaard", is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area to the North Cape, the "skjaergaard" lies along the whole of the coast of the mainland; east of the North Cape, the "skjaergaard" ends, but the coast line continues to be broken by large and deeply indented fjords.

'Within the "skjaergaard", almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. *The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjaergaard".*¹

'The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 metres high, can be seen from a considerable distance; there are other summits rising to over a thousand metres, so that the Norwegian coast, mainland and "skjaergaard", is visible from far off.²

¹ The italics here and throughout this article are those of the writer.

² The Court emphasized that owing to the mountainous nature of the coast the land is visible far out to sea, but did not, apparently, draw any legal conclusion from that fact. Judge McNair emphasized the irrelevance of a mountainous coast being more visible than a flat coast (Dissenting Opinion, pp. 170-1).

'Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments ("meds"), at points where two lines drawn between points selected on the coast or on islands intersected.'

Outline of the historical facts

The pleadings in the case occupy eight volumes, a substantial portion of which consists of historical material. The Court, however, dealt with the historical part of the case somewhat cursorily, and a brief outline of the historical facts will suffice here. This outline will be divided into two periods: (1) from the sixteenth century to 1906, the date when British trawlers began to fish off Norway; (2) from 1906 onwards.

1500-1906. In the sixteenth century, towards the end of what may be termed the *mare clausum* era, the Kingdom of Denmark-Norway¹ still maintained pretensions to exclusive sovereignty over all the northern seas. These pretensions were disputed by Queen Elizabeth between 1583 and 1602 with respect to fisheries off both Iceland and Norway, and in negotiations with Denmark at Bremen the English delegates championed the freedom of fisheries on all the seas.² The accession of James I and Holland's growing maritime power brought a change of policy. James I attempted to exclude Dutch fishermen from the fisheries off the English coast and agreed with Christian IV of Denmark that British subjects would thenceforth refrain from whaling and fishing off Norway.³ The Court held that it was in consequence of the Danish objections at the beginning of the seventeenth century that British fishermen refrained from fishing off Norway between 1616 and 1906. This statement may be doubted, for nothing was ever heard again of James I's letter. On the other hand, British fisheries as a whole fell into very serious decay during this period and there is little evidence of British fishing off Norway until trawling began at the beginning of the present century.⁴ The initiative during this period passed to the Dutch who had fishery disputes with Denmark in the eighteenth century, particularly concerning the Icelandic fisheries, and the British Ambassador at

¹ The two Kingdoms remained united until 1814.

² Fulton, pp. 108-12; Raestad, *Annex 83*, pp. 14-17.

³ Raestad (op. cit., pp. 16-17) attributes this change of policy largely to the triumph of a Scottish policy of exclusive fishery under the Stuart kings. Scotland at that date had not been affected by Roman doctrines of freedom of the sea and held views on maritime sovereignty nearer to those of Denmark than to those of Queen Elizabeth. But the change seems to have been due at least as much to naval policy as to Scottish influence (see Fulton, chapter iv).

⁴ Larsen, however, states that British fishermen were responsible for introducing more modern fishing methods into Norway in the seventeenth and eighteenth centuries (*History of Norway* (1948), pp. 301-2).

Copenhagen then supported Dutch opposition to Denmark's large claims.¹ At the same time, Norway's own fisheries in the north dwindled almost to nothing, having been ruined by the grant of a trading monopoly to Bergen. Until the second half of the nineteenth century the most important fisheries off Norway's northern coasts were undoubtedly those of the Russians from Archangel. In the middle of the eighteenth century payment was made by the Russians for the privilege of fishing beyond one league from the shore and of landing for bait and for curing the catch. But by 1830 these payments were made in respect only of the right to land, and the fishery beyond one league from shore was recognized by Norway to be free.²

Meanwhile, under the pressure of the great maritime wars of the period the Kingdom of Denmark-Norway had been driven to reduce its maritime pretensions and to define its claims.³ In 1691 a Royal Rescript declared that ships captured by foreign warships were not good prize if taken within range of vision from shore, which was to be reckoned as four or five leagues from the outermost rocks. In 1745, however, a further Rescript forbade privateers to take prizes within one league from the Norwegian coasts and 'from the banks and rocks situated off the coasts which are considered to be part thereof'. Royal Resolutions of 1756-9 defined a league for the purpose of the prize rule as equal to one-fifteenth of a degree of latitude, i.e. *four sea miles*. Subsequent decrees gave rise to doubts whether the league was to be measured from the mainland or from the islands and rocks, and in 1812 the point came to a head when a prize was captured by a French privateer within one league of a certain rock.⁴ Reference was made to Copenhagen, and a new Royal Decree⁵ was issued in 1812:

'We wish to lay down as a rule that, in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at the distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea.'

It was thus made clear that the one league was to be measured from the outermost island or rock, though it did not specify whether 'not covered by the sea' referred to high or low tide.⁶ The one-league limit had begun in 1745 solely as a neutrality limit but, as happened elsewhere in the world, the neutrality limit was extended to fisheries. This development, according to the Norwegian jurist Raestad, had probably occurred by 1800 and

¹ Dispatches of Titley, British Minister at Copenhagen, 1739-41, Public Record Office.

² *1912 Report*, p. 18.

³ The texts of these and other Decrees can be found in the Norwegian Counter-Memorial, Annexes 6-24; see also the *1912 Report*, pp. 16 ff., and Crocker, *The Extent of the Marginal Sea* (1919), under the titles 'Denmark' and 'Norway'.

⁴ Raestad, *Annex 83*, pp. 28-32.

⁵ *Ibid.* The 1812 Decree was issued as a secret neutrality regulation and only came to light in 1830 through its publication in an historical work.

⁶ Low tide was only formally adopted as the test in a Decree of 1908.

certainly by 1830.¹ At all events, the 1812 Decree came to be regarded as a general law governing Norway's maritime limits.

The 1812 Decree, however, was incomplete. As the Court said (at p. 134): 'the text does not clearly indicate how the base lines between the islands or islets farthest from the mainland were to be drawn. In particular, it does not say in express terms that the lines must take the form of straight lines drawn between these points.'

It also said nothing about ordinary fjords where there are no islands. Raestad in an Opinion in 1927² pointed out the improbability of the Rescript having been intended to lay down imaginary straight base-lines since the traditional Norwegian law was associated with range of vision, which presupposes a base-line on actual land. Norway's system of straight base-lines does not therefore derive directly from the 1812 Decree but from constructions put upon that Decree in later legislation. The critical laws are the Royal Decrees of 1869 and 1889 relating to small sections of the coast lying some 300 miles to the south of the area of the 1935 Decree. Swedish vessels having appeared off Sunnmore, the 1869 Decree defined the fishery limit there as a line one league (four sea-miles) to seaward of a straight base-line twenty-six miles long and drawn between two islets of the Skjaergaard.³ France, who had had a dispute with Norway in the previous year concerning the arrest of a French vessel, the *Quatres Frères*, promptly lodged a protest against the Decree.⁴ Other states, including Great Britain, took no action. The 1889 Decree, which was passed in connexion with Norwegian, not foreign, fishing, carried the base-line northwards along the coasts of Romsdal and Nordmore, for a further fifty-six miles by four straight lines drawn between islets.⁵ No state reacted to this Decree. These two Decrees thus covered a bare eighty-two miles of Norway's extensive coastline and the only other significant legislation in the nineteenth century was the fixing of the limit in the Varangerfjord by whaling laws of 1881 and 1896.⁶ The limit was to be one league to seaward of a straight line, thirty miles long, joining the entrance points of the fjord. The Varangerfjord line was the only base-line fixed in the disputed area before the present century and, *after careful consideration, the line between the actual entrance points of the fjord* (base-points nos. 1 and 2) was chosen instead of a longer line. Norway's historic title to this base-line was not contested by the United Kingdom.

1906-51. About 1906, with the advent of steam-trawling, British fishermen appeared off northern Norway. A law of that year prohibited

¹ Raestad, *Annex 83*, pp. 28-32.

² This Opinion was supplied by him at the request of the prosecution to assist the Court in *The Deutschland* case (see p. 123 below); for the Opinion see Annex 47, no. 2, of the Norwegian Counter-Memorial.

³ Annex 16 of the Norwegian Counter-Memorial.

⁴ *Ibid.*, Annex 18; see p. 163 below.

⁵ *Ibid.*, Annex 17.

⁶ *Ibid.*, Annex 19.

foreign fishing within territorial waters but without defining them. Further instructions to fishery protection officers merely defined the fishery limit in the same terms as the 1812 Decree, i.e. one league from the outermost islets and rocks not covered by the sea.¹ In addition, there was a letter from the Minister for Foreign Affairs to the Minister of Defence concerning the application of the 1812 Decree in Finnmark in which he said:²

‘Cette prescription doit, plus précisément, être ainsi comprise que la limite se compte à partir de la ligne du littoral qui avance le plus dans la mer à marée basse, ou de l’île ou l’îlot le plus éloigné, qui n’est pas constamment recouvert par la mer. La mer territoriale dans le Finnmark comprend en outre, en vertu du droit international et de la coutume, les fjords et baies adjacents, et la limite de pêche sera tracée à la distance d’une lieue géographique en partant des lignes qui relient les points extrêmes des deux côtés de ces fjords et baies.’

This letter certainly appears to measure the one-league limit from the coastline of the mainland or from the outermost islands and islets and, in the case of fjords, *from the line joining the actual headlands of the individual fjords*. If Norway was already acting upon base-lines similar to those of the 1935 Decree as early as 1908, there was no Norwegian law or administrative instruction before the Court to show it. Nor did Norway’s replies to inquiries about her limits from Russia, Great Britain, and France in the years 1907–8 indicate that such base-lines were in force.³ The reply to France, for example, ran:

‘En interprétant les prescriptions norvégiennes dans cette matière et étant, en même temps, en conformité de la règle générale du droit des gens, ce ministère s’est exprimé dans ce sens que la distance à partir de la côte doit être comptée de la ligne de la basse marée, et que chaque îlot qui n’est pas continuellement submergé par la mer doit être compris comme point de départ.’

The reply to Great Britain enclosed a copy of the 1889 Decree relating to Romsdal and Nordmore and of the whaling law of 1896 relating to Varangerfjord, describing them simply as relating to ‘certain parts of the coast’.

In 1911 a Royal Commission was set up to inquire into the limits of territorial waters on the Finnmark coast from which there emerged an important report in 1912. This Report,⁴ the *1912 Report*, was divided into two parts. The first part reviewed Norway’s legislation and legal opinion concerning the extent of Norwegian waters, Norway’s diplomatic correspondence with other countries, and, briefly, the international law concerning territorial waters. The Commission said that Norway claimed as fjords not only waters enclosed by the mainland but also those waters possessing the character of fjords by reason of a series or group of islets on one or other

¹ For these two Decrees see Annexes 22 and 23 of the Counter-Memorial.

² Ibid., Annex 21.

³ Ibid., Annexes 31–34.

⁴ See p. 114, n. 1, above.

side. Then, conceding that doubts might arise as to the closing lines at the mouths of individual fjords, the Commission said:¹

‘En général, dans les cas particuliers, on prendra le plus sûrement une décision en conformité avec la vieille notion juridique norvégienne, si l’on considère la ligne fondamentale comme étant tirée entre les points les plus extrêmes dont il pourrait être question, non-obstant la longueur de la ligne.’ •

This *dictum* was based primarily on the 1869 and 1889 Decrees and on the *Exposé des Motifs*² explaining the decrees when submitted by the Minister of the Interior for approval. As to the *Exposés des Motifs* it is enough to say here that the International Court held them to show that the straight base-line method used in the 1869 and 1889 Decrees was then regarded by the Minister as the particular application of a general principle applicable on all the Norwegian coast. It must, however, also be observed that the *Exposé des Motifs* was not part of the Decrees and only became generally known for the first time in the 1912 *Report*. Moreover, it appears in the Report that distinguished Norwegian authorities entertained serious doubts as to how far it was legitimate to join lines between islands.³ The second part of the Report, which contained the views of the Commission in regard to the actual base-lines, has never been published. The Norwegian Government revealed in its pleadings the lines recommended in 1912 which in fact were much the same as those promulgated twenty-two years afterwards in the 1935 Decree.⁴ It did not disclose the Commission’s reasons for selecting these particular base-lines.

The *Lord Roberts*, a British vessel, was fined in 1911 for fishing inside the Varangerfjord and a desultory diplomatic correspondence ensued between the two Governments which petered out in the First World War.⁵ After the war, other foreign vessels, particularly German vessels, began to join in the fishing. Further incidents having occurred, British and Norwegian experts met in Oslo in 1924 and in London in 1925 in an attempt to reach agreement concerning Norway’s fishery limits.⁶ The Norwegian experts, when asked to state Norway’s claims, did not mention the lines recommended by the 1912 Commission but drew on charts certain red lines as representing approximately their idea of the limits claimed by Norway. These Red Lines in many places run considerably closer to the land than the lines of the 1935 Decree. The Red Lines were put forward entirely ‘without prejudice’ and the Norwegian Government objected to

¹ At p. 20.

² See Annexes 16 and 17 of the Counter-Memorial.

³ See 1912 *Report*, pp. 45-53.

⁴ Annexes 36 and 37 of the Counter-Memorial.

⁵ The British protest in this case was misconceived, since it overlooked the fact that Norway’s title to the Varangerfjord had been virtually recognized in the course of the argument in the *Behring Sea Arbitration* in 1893 (Oral Argument, p. 272).

⁶ Annexes 4 and 7 of the United Kingdom Memorial.

their being taken into account by the Court at all. The United Kingdom, however, insisted that, although the Red Lines were in no sense binding on Norway, they did provide legitimate evidence of official Norwegian opinion in 1924-5 as to the approximate limits resulting from an application of the Norwegian system to the coasts in question. It also pointed to a passage in an official report of the Ministry of Foreign Affairs in 1926 commenting on the 1924-5 meetings:¹

'Fishery Adviser Iversen and Captain Askim, after the special consent of the Ministry of Foreign Affairs had been obtained for the purpose, plotted the lines defining the territorial waters claimed by Norway. *As far as possible these were based upon the principles and indications advanced in the Royal Resolution regarding territorial waters off the coast of Møre of 16th October, 1869, and 9th September, 1889.*'

The Court made no reference to the 1924-5 Conversations in its judgment, nor to the above report. As, however, it omitted any reference to a number of other facts much stressed by the Parties, it is impossible to say whether it did so in this instance on principle or on the ground of relevance.

The 1924-5 Conversations failed and from then until the issue of the 1935 Decree the position off Norway's northern coasts was obscure. The United Kingdom instructed British fishing interests that they could count on not being interfered with if they did not fish beyond the Red Lines and so informed Norway. The latter instructed her fishery protection vessels to arrest foreign trawlers within the Red Lines and to warn them off even outside the Red Lines up to the lines afterwards proclaimed in the 1935 Decree. Norway did not communicate her enforcement policy to the United Kingdom, which imagined that the Red Lines were in force as a *modus vivendi*. The issue of the Royal Decree of 1935 removed the uncertainty but it was at once challenged by the United Kingdom and British vessels continued to fish up to the Red Lines. The result was another series of arrests and protests, and, further attempts to settle the dispute being unsuccessful, the United Kingdom took the case to the Court by unilateral application on 5 May 1949.

Between 1906 and 5 May 1949 fifty British vessels were prosecuted and twenty-four warned, while thirteen German vessels were prosecuted and one Finnish vessel warned. In some of the cases the defendant disputed the fishery limit applicable at the place in question. After 1935 the Norwegian courts necessarily followed the Royal Decree, but four of the earlier cases require mention:

The Kanuck (1923).² This case concerned the Persfjord³ in East Finnmark where there is no island fringe. The Norwegian Foreign Minister

¹ See paras. 58 and 75 (c) of the United Kingdom's Reply.

² Annex 41 of Norwegian Counter-Memorial.

³ Part of the section covered by base-points 5-6 of the 1935 line.

justified the seizure of the British vessel as being within 2·7 miles of the line Harbakken-Kavringen, a line drawn *between two headlands and following the configuration of the land more closely than the 1935 line*.

The Deutschland (1927).¹ This case concerned the Frohavet, an indentation in the island fringe on the west coast to the south of the 1935 line.² A German vessel was convicted of a customs offence in circumstances which raised the issue of the proper base-line. The trial Court ruled that the customs limit 'must be drawn parallel with the chief direction of the coast' and that in consequence the base-line would run between islets outside the mouth of the indentation. The Supreme Court³ set aside this ruling on the ground that, whatever line Norway might be entitled to claim, such a line as the lower Court had adopted could not be applied in a criminal case unless sanctioned either by express legislation or at least by a clear custom. The Court followed an Opinion given by the Norwegian jurist Raestad to which reference has previously been made.⁴ It referred to the 1812 Decree and then said:

'For the greater part of the extensive coast of the country, no documents have been produced to prove that there exist more precise provisions, except for the coast off the county of Møre, for which reference is made to the two royal decrees of 1869 and 1889.'

This language hardly suggests a clearly understood system of straight base-lines 'following the general direction of the coast' already existing in Norwegian law in 1927.

The Lord Weir (1930).⁵ This case concerned the Syltefjord in East Finnmark where there is no island fringe.⁶ The charge here was of fishing at a spot 3·6 miles outside the line Haabrandresset-Klubbesspiret, a line *joining the headlands of this fjord and following the configuration of the land more closely than the 1935 line*. This line, put forward by the prosecution, had been accepted by both sides in the 1924-5 Conversations as the closing line of the fjord.

The St. Just (1933).⁷ This case also concerned the Syltefjord, but in the meanwhile the Norwegian Government had decided to enforce the line afterwards promulgated in the 1935 Decree. The trial Court accepted this line instead of the line used in *The Lord Weir*. It runs between two extreme base-points twenty-five miles apart and passes outside the headlands of the Syltefjord which are themselves only about seven miles apart. The

¹ Annex 47, No. 2, of the Norwegian Counter-Memorial; *Annual Digest and Reports of Public International Law Cases*, 1927-8, Case No. 87.

² The Frohavet is in the Trondjheim area.

³ By a majority of four to one.

⁴ *Supra*, p. 119.

⁵ See para. 38 of the United Kingdom Memorial.

⁶ This fjord, like the Persfjord of *The Kanuck* case, forms part of the section between base-points 5-6 of the 1935 line.

⁷ Reported in Annex 48 of the Norwegian Counter-Memorial.

Supreme Court upheld the trial Court's decision by a majority of three to two, repudiating the views expressed by the Court only six years before in *The Deutschland* case. The leading judgment of the majority was delivered by Judge Klaestad, now a Judge of the International Court, who held that:

- (a) the four-mile limit does not follow all the curves of the coast but must be drawn in accordance with straight base-lines; and
- (b) the base-lines must be drawn in accordance with the general direction of the coast.

Judge Klaestad relied not only on the 1869 and 1889 Decrees to establish the Norwegian system but on statements prepared by the Norwegian Government in 1927 and 1928 in connexion with the 1930 Codification Conference on Territorial Waters. The substance of these statements is contained in the following passage of its 1928 memorandum:¹

'In accordance with the old conception of the constitutional status of the waters washing the "Skjaergård", the direction laid down by this decree should be interpreted in the sense that the starting-point for calculating the breadth of the territorial waters should be a line drawn along the "Skjaergård" between the furthest rocks *and, where there is no "Skjaergård", between the extreme points*. This interpretation of the decree has always been taken as a basis whenever the limits of the territorial sea have had to be fixed in detail (Royal Decree of October 16th, 1869, regarding the waters off the Sunnmøre coast, and Royal Decree of September 9th, 1889, regarding the waters off the Romsdal coast).

'There is no rule in Norway regarding the maximum distance between the starting-points of the base lines from which the breadth of the territorial waters is calculated. *In choosing the places which, according to the Decree of 1812, are to be regarded as the extreme points, the particular circumstances of each part of the coast have to be taken into account.* There may be historical, economic or geographical factors, such as a traditional conception of territorial limits, the undisturbed possession of the right of fishing, exercised by the coastal population since time immemorial and necessary for its subsistence, and also the natural limits of fishing-grounds.

'In the above-mentioned Decrees of 1869 and 1889, base lines of 25·9, 14·7, 23·6 and 11·6 nautical miles were fixed.

'The question of the fixing of exact base lines for the rest of the Norwegian coast is being studied by a Royal Commission appointed for the purpose.

'In this connection, it should also be observed that all fjords, bays and coastal inlets have always been claimed as part of the Norwegian maritime territory, *whatever the width at their mouth and no matter whether they are formed by the mainland or by developments of the "Skjaergård"*. In determining the starting-points for calculating the breadth of territorial waters, the base line chosen is the lowest-water mark.'

The Norwegian Government does not expressly say in this passage that following the 'general direction of the coast' is one of the principles of the Norwegian system. It does, however, make a clear-cut claim to a Norwegian system of straight base-lines.²

¹ Bases of Discussion, p. 174.

² This may be contrasted with the cautious attitude of the Supreme Court at almost the same

The principal issues in the case

The United Kingdom conceded in the pleadings that Norway possessed an historic title (1) to a maritime belt four miles in width and (2) to all the waters of her fjords and sunds.¹ It challenged the 1935 Decree broadly on the following grounds:

- (a) The base-lines were in conflict with what it contended was the accepted customary rule that the base-line must follow the low-water mark all along the actual coast, except where there are inland waters when it must follow the proper closing line of the inland waters.
- (b) Inland waters under international law are areas of sea enclosed within the coastline, and Norway's historic title to her fjords and sunds did not entitle her to draw base-lines enclosing areas of sea outside the entrances to the fjords and sunds and not enclosed within the coastline. Her base-lines must follow the proper closing lines of the fjords and sunds.
- (c) If Norway relied on an exceptional right to a special system of straight base-lines, disregarding the low-water mark on the open coast and the proper closing of inland waters, then the burden was upon her to establish her title to such a system as against the United Kingdom.

Norway, on the other hand, sought to justify the 1935 Decree by three alternative contentions:

- (1) by denying the existence of any customary rule requiring her base-line in general to follow the low-water mark along the coast or the line across the actual entrances of the fjords and sunds;
- (2) by denying that the customary rule, even if it existed, is capable of application to such an exceptionally broken and indented coast as that of Norway; and
- (3) by claiming to possess an historic right to a traditional Norwegian system of straight base-lines inconsistent with the low-water-mark rule.

Norway's claim to a four-mile limit not being in dispute, the rule of international law governing the extent of the territorial sea was not directly in issue in the case.² However, this crucial question at one time looked like

date in *The Deutschland* case (see p. 123 above) and with the Opinion in that case of Raestad, who was afterwards the Norwegian delegate at the 1930 Conference.

¹ The United Kingdom argued that the historic title was to *territorial waters* in the case of those sunds which form routes of international navigation, but did not press the point at the oral hearings (see p. 158 below).

² The difference between the Scandinavian four-mile and the normal three-mile claim, which was partly responsible for the failure of the 1930 Conference, seems to have been due to the accident of the different league measures in force in Europe at the end of the eighteenth century. See, generally, the United Kingdom's Reply, paras. 107-16 and 148-52; see also Walker in this *Year Book*, 22 (1945), p. 210.

being the central issue of the case owing to the form which one of Norway's arguments took in the written pleadings. Although this argument was not pursued at the oral hearings, it raises points of such fundamental importance in all forms of maritime claims that it is necessary first to say something about the maritime belt before dealing with the base-line and inland waters.

The width of the maritime belt

The United Kingdom's recognition of Norway's claim to a four-mile limit is clearly something of a landmark in the law of the sea, since it is the first time that the United Kingdom has recognized any limit larger than three miles. It is therefore important that the significance of the United Kingdom's change of attitude in regard to Norway's claim should not be exaggerated and that the reasons for it should be understood. Norway's four-mile limit derives simply from the fact that in the eighteenth century a four-mile league was in use in Scandinavian states instead of the three-mile marine league employed in the rest of Europe. The four-mile league entered Danish-Norwegian practice in 1745, about half a century before the three-mile league entered international practice as the neutrality limit of the United States. The one-mile difference between the Scandinavian league and the generally applied marine league was little appreciated by non-Scandinavian states until the end of the nineteenth century. By then the three-mile limit appeared to be generally accepted and Great Britain opposed the larger Scandinavian claim.¹ After the failure of the three-mile limit to gain acceptance at the 1930 Codification Conference as a *universal* limit, the United Kingdom reconsidered its attitude and in the *Fisheries* case acquiesced in Norway's four-mile limit, *but only as an historic limit older than the customary three-mile limit*.

Norway brought the maritime belt into the arena in the following manner.² Contending that the failure of the 1930 Codification Conference had put an end to the whole system of fixed maritime limits, she argued that a state is now entitled simply to fix the extent of its coastal waters in accordance with its 'legitimate interests'. On this hypothesis, she represented that it was pointless to discuss base-lines, since a state could always circumvent restrictions imposed by base-line rules by simply enlarging the width of its maritime belt to suit its 'legitimate interests'. Both steps in this argument, the failure of the 1930 Conference and the 'legitimate interests' theory, merit examination.

The failure of the 1930 Codification Conference. The United Kingdom argued that the mere failure of the Conference could not possibly sweep

¹ Denmark herself had by then accepted a three-mile limit in fisheries outside the Baltic, i.e. in the North Sea Fisheries Convention, 1882, and, in regard to Iceland, in the Anglo-Danish Convention of 1901.

² Counter-Memorial, para. 245.

away the existing system of fixed maritime belts found in state practice. Nor could it alter the basis of maritime international law, which in common with other customary law derives from the consent of states so that the extent of a state's maritime sovereignty is not a matter simply of its own choice but depends on the consent—express or tacit—of other states. Raestad, the Norwegian delegate in 1930, had written before the Conference:¹

‘Le plus important, ce n’est pas du reste, à mon avis, de savoir quand et comment a eu lieu l’occupation ou l’usurpation de tel ou tel droit sur la mer côtière. *L’important, c’est de savoir quand et comment a eu lieu le consentement exprès ou tacite des nations* qui donne à l’occupation ou à l’usurpation la qualité d’un titre de droit.’

Norway herself at the 1930 Conference had refused to recognize any limit larger than her own four-mile limit unless supported by a continuous and ancient usage.² Gidel, the greatest living authority on the law of the sea, had also said after the Conference that the effect of its failure was to leave the three-mile limit as a universally accepted minimum and the validity of larger claims dependent on the consent of other states. Of a larger claim he said:³

‘Elle n’a de valeur internationale que par *l’assentiment individuel de chaque État et pour cet État seulement.*’

The Court's attention was then drawn to simultaneous Notes addressed by Sweden and Denmark to the Soviet Union in 1950 and again in 1951 concerning the latter's claim to a twelve-mile limit in the Baltic.⁴ The Swedish Note of 1950 contained the following paragraph, which appeared in almost identical terms in the Danish Note and was repeated by both Governments in 1951:

‘While it is true that Sweden has never maintained that there are uniform rules governing the limit of territorial waters, there can be no doubt that European States have assigned fixed limits dating from some centuries ago to their territorial waters. In the case of the Baltic States, this limit extended to three, and in certain cases, to four sea-miles. In this way a legal code has been established whereby the sea beyond these territorial limits must be regarded as open sea, concerning which it cannot, under international law, be the subject of occupation. *Any extension of territorial waters, therefore, in the view of the Swedish Government, amounts to an appropriation of the open sea, where the nationals of every State enjoy fishing and sailing rights without interference by other States.*’

The Belgian and Dutch Governments in Notes dealing with Iceland's new claims and the French Government in a Note dealing with recent

¹ *La Mer territoriale* (1913), p. 167.

² Plenary Meetings, p. 136.

³ Gidel in *Recueil des Cours de l'Académie de Droit International* (1934) (ii), p. 180.

⁴ Annex 111 of the Norwegian Counter-Memorial.

Latin-American claims also adopted the same standpoint.¹ The French Note was particularly strong:

‘Aucun État ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d’invoquer le principe de la liberté des mers, tant que ces derniers ne l’aient pas formellement acceptés.’

These states were, of course, only invoking the constitutional principle that customary rights in international law flow from the consent of states. An extension of existing limits accordingly requires the express or tacit agreement of other states.

Norway’s ‘*Legitimate Interests*’ theory of coastal waters. Norway formulated her ‘legitimate interests’ theory as follows:²

‘A State’s maritime territory is restricted to adjacent waters, namely, to those waters which may be considered as accessory to the land. Waters accessory to the land are those waters which the coastal State has power to appropriate or occupy *and in regard to which its legitimate interests justify its appropriation.*’

And again:³

‘The State has the right to prescribe provisions concerning the breadth of its maritime territory *within reasonable limits*. It is a matter of appreciation what is reasonable, given that one must take into account topographical and hydrographical considerations, economic conditions and the vital interests of the population, long usage and the rules of law which have been developed in the country in question.’

Norway maintained that all the formulae found at one epoch or another in state practice—range of vision, cannon shot, and modern numerical limits—have simply given concrete expression to the fundamental norm of the coastal state’s legitimate interests.

Norway further maintained that under international law it is within a state’s competence to delimit its own coastal waters and that any customary rules appear as restrictions on this competence. Citing *The Lotus* case⁴ she invoked the doctrine that restrictions on the competence of a state are not to be presumed. On this view, there is a presumption that any new delimitation of coastal waters—any new claim of whatever kind—is competent and binding on other states unless shown to be specifically forbidden by international law. In short, although Norway herself said that the interests of the coastal state and the freedom of the seas are *principles of equal legal weight*, she argued that any doubt as to the applicable law must always be resolved in favour of the coastal state and, therefore, against the freedom of the seas. Under her ‘legitimate interests’ theory, any new claim would be binding on other states unless affirmatively shown to be unreasonable, i.e. not in accordance with the coastal state’s legitimate interests.

¹ These Notes are all dated 1951. The French Note was filed by letter before the Oral hearing, the other two Notes were read into the record by Counsel for the United Kingdom.

² Counter-Memorial, para. 242.

³ Rejoinder, para. 3.

⁴ *P.C.I.J.*, Series A/10, p. 18.

The United Kingdom objected that Norway's 'legitimate interests' theory really is not law at all. First, the legality of a claim is made dependent on a subjective appreciation of a series of extremely vague factors from the point of view of the coastal state.¹ Secondly, to speak of the legitimate interests of the coastal state begs the whole question—legitimate in respect of whom? Of the coastal state alone? Interests, from a legal point of view, can only be legitimate in their relation to the interests of others. Consequently, the law of coastal waters must express not the interest of the coastal state alone but also the interest of other states in the freedom of the seas. Historically, range of vision, cannon shot, and fixed numerical limits were not measures expressing simply the point of view of the coastal state. These measures were adopted in state practice under the twofold pressure of the interest of the coastal state and the interest of other states in the high seas. They represented the line of compromise at the various epochs between the claim of the coastal state and the willingness of others to respect that claim. The fundamental norm has not therefore been the interest of the coastal state in adjacent waters. It has been the consent of states which has operated to reconcile the conflicting interests of the individual coastal state and of the international community.

In the same way the United Kingdom argued that neither historically nor today do the rules concerning coastal waters appear simply as restrictions upon the sovereignty of the coastal state. They also appear as restrictions upon the sovereignty of other states compelling them to respect the coastal state's claim.² To speak of the delimitation of coastal waters being within a state's competence again begs the whole question. The question is whether the delimitation of coastal waters is within the *exclusive* competence of a state. The principle in *The Lotus* case that 'restrictions on the independence of States are not to be presumed' only operates within areas of state activity which, in principle, are left by international law to the discretion of a state. It was in regard to the exercise by Turkey of criminal jurisdiction *over persons indisputably within her territorial boundaries* that the Court applied the principle.³ But the case is very different when the acts of sovereignty are not performed within the undisputed territorial boundaries of the state concerned and *when the whole question at issue is whether the area is within the state's sovereignty at all*. In *The Lotus* case itself the Court had expressly distinguished the exercise of jurisdiction against a foreign vessel on the high seas:⁴

¹ The danger of accepting a subjective criterion was emphasized by Judge McNair (p. 169).

² See Sørensen, *Les Sources du droit international* (1946), p. 101. See also the passage from Raestad's *La Mer territoriale* cited on p. 127 above.

³ See *P.C.I.J.*, Series A/10, pp. 18–19.

⁴ *Ibid.*, p. 25. Cf. the *dictum* of Judge Read in the *Anglo-Norwegian Fisheries* case (p. 189): 'Here we are not dealing with the exercise, by a State, of sovereignty within its domain. We are dealing with State action *which extends its domain*, and purports to exclude all other States from

'In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.'

- In the Norwegian case the very question at issue was whether the disputed areas were high seas or not.

The United Kingdom further objected that the Norwegian formulation of the law was unsupported by any authority. The 'legitimate interests' theory of coastal waters is inconsistent with the whole system of fixed numerical limits as it is found in state practice. It is also entirely opposed to the attitude of states at the 1930 Codification Conference and to that of Denmark and Sweden in their recent Notes protesting *against any extension of established limits* in the Baltic.¹

The difference between the two Parties as to the principle of the law of coastal waters touches the very foundations of maritime law and is of particular significance today when the régimes of the high seas and of coastal waters are undergoing a re-examination. It is of some importance that Norway at the oral hearing abandoned her claim to be entitled to expand her maritime belt at will in order to satisfy economic or other interests. She conceded that she possessed a fixed belt of territorial sea four miles in width and that there was no question in the case of any extension of this limit. She now insisted that the case solely concerned the base-line and confined her theory of legitimate interests to the delimitation of base-lines. It is, however, obvious that the principle under which a unilateral extension of maritime limits is not binding on other states without their acquiescence is relevant also in regard to an extension of inland waters.

The Court, since it held that Norway possesses an historic right to a system of straight base-lines, had not to deal with an *extension* of established limits. However, it did make an important pronouncement on the general principle (p. 132):

'The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.'

This orthodox statement at first sight endorses the United Kingdom's view of the general principle of the law of coastal waters. But, naturally,

areas of the high seas. We are dealing with expansion of the maritime domain designed to deprive other States of rights and privileges which, before the extension, they were entitled to enjoy and exercise, under the rules of international law. In these circumstances, I should have much difficulty in justifying the Norwegian system *as an exercise of powers inherent in State sovereignty*.'

¹ Annex 111 of the Norwegian Counter-Memorial; and see p. 127 above.

everything depends on what, in the Court's view, is the content of the law concerning the delimitation of sea areas.

*The international law regulating the delimitation of
base-lines and inland waters*

The Court rejected the United Kingdom's contention that customary law requires the base-line to follow the low-tide mark all along the actual coastline except where there are inland waters. The Court held the rule of international law to be that the base-line must follow the 'general direction of the coast' and within certain limits endorsed the drawing of straight base-lines from point to point along the coast. But, before examining the Court's statement of the law, we must see by what process of reasoning it rejected a principle which the United Kingdom believed to be well-established customary law.

The United Kingdom's formulation of the customary rule will, for the sake of brevity, be referred to hereafter as the 'coastline' rule. This rule appears in one form or another in the draft codes of all the learned bodies which have undertaken a study of the extent of coastal waters—in the resolutions of the Institute of International Law in 1894 and 1928,¹ in those of the International Law Association in 1895 and 1926,² in those of the Japanese Institute in 1926³ and of the American Institute in 1927,⁴ and in the draft code of the Harvard Research Committee in 1929.⁵ It appears in the works of authoritative individual writers on the law of the sea, like Fauchille⁶ and Gidel.⁷ It is found in the decrees of many states and in international Conventions.⁸ It was unhesitatingly accepted by the League of Nations Committee of Experts in their first report issued in 1926 before obtaining the views of governments⁹ and again in their second report presented to the 1930 Codification Conference after considering the replies of governments.¹⁰ In their earlier report, the Committee said:¹¹

'The general practice of States, all projects of codification and the prevailing doctrine agree in considering that this line (the base line) should be low-water mark along the whole of the coast.'

At the 1930 Conference itself the delimitation of the base-line was entrusted to Sub-committee No. II—the width of territorial waters being reserved

¹ *Annuaire*, 1894, p. 328; *ibid.*, 1928, p. 755.

² *American Journal of International Law* (hereafter cited as *A.J.I.L.*), 23 (1929), Supplement, p. 373.

⁴ *Ibid.*, p. 370.

⁶ *Traité de droit international*, 8th ed. (1925), vol. i, Part II, p. 198.

⁷ Gidel, vol. iii, p. 517.

⁸ Some of the evidence appears in the report of the Harvard Research Committee (*op. cit.*, pp. 255-62).

⁹ *A.J.I.L.* 20 (1926), Supplement, p. 62.

¹⁰ Bases of Discussion, p. 39.

¹¹ *A.J.I.L.* 20 (1926), Supplement, p. 79.

for the main Committee. The report of this Sub-committee, consisting of thirteen states, had thus a particular importance for the present case. The base-line rule was framed as follows:¹

Base-line

‘Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark *along the entire coast*.

‘*Observations.* The line of low-water mark following all the sinuosities of the coast is taken as the basis for calculating the breadth of the territorial sea, excluding the special cases of (1) bays, (2) islands near the coast and (3) groups of islands, which will be dealt with later. *The article is only concerned with the general principle.*’

The Sub-committee thus unambiguously endorsed the coastline rule, i.e. the tide-mark with exceptions in the cases of bays and islands. With all this weight of consistent authority behind the coastline rule it is scarcely surprising that Judge Read² had ‘no doubt that the coastline rule is an established rule of international law’, that Judge McNair³ considered it to be supported by ‘an overwhelming consensus of opinion amongst maritime States’, or that Judge Hsu Mo⁴ believed it ‘to be a general principle’. The radical nature of the Court’s decision repudiating the coastline rule is apparent.

The Court’s rejection of the coastline rule

The coastline rule, as formulated by Sub-committee No. II, has a general principle (the tide-mark along the shore) and two special rules (bays and islands). The general principle is that, the maritime belt being appurtenant to the land, it normally must extend from the actual line of the land, which is defined for legal purposes by the tide-mark along the coast. The exceptions come into play whenever sea areas are so far enclosed by the land that they are properly to be considered as within the true line of the land. The exceptions are important and the uncertainty as to their precise scope has in the past caused some difficulty. But the uncertainty in regard to the exceptions has never been considered to throw doubt on the main principle. The Court did not refer to the large body of authority which supports the coastline rule and dealt with the rule very summarily in the following passage (p. 129):

‘It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the Codification of International Law formulated the low-water mark rule somewhat strictly (“following all the sinuosities of the coast”). But they

¹ Plenary Meetings, p. 131. Sub-committee No. II consisted of delegates of thirteen states: Chile, France, Germany, Great Britain, Greece, Italy, Japan, Norway, Poland, Portugal, Sweden, the United States of America, and Holland. The Sub-committee was, in fact, thoroughly representative of all points of view.

² At p. 187.

³ At p. 161.

⁴ At p. 154. Judge Hackworth upheld the Norwegian 1935 line on historical grounds only and therefore, by implication, he also was not with the majority in rejecting the tide-mark rule.

were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the *tracé parallèle* which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the United Kingdom Government. Consequently, it is no longer relevant to the case. "On the other hand," it is said in the Reply, "the *Courbe tangente*—or, in English, envelopes of arcs of circles—method is the method which the United Kingdom considers to be the correct one."

'The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the Codification of International Law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by Counsel for the United Kingdom Government in his oral reply. In these circumstances, and although certain of the Conclusions of the United Kingdom are founded on the application of the arcs of circles method, the Court considers that it need not deal with these Conclusions in so far as they are based on this method.'

This passage, which, on general international law, is the most crucial passage in the judgment, is open to the following criticisms:

1. The rule of the tide-mark following the sinuosities of the coast has always been recognized in state practice *accompanied by its exceptions*. That Sub-committee No. II admitted exceptions was only to be expected and does not detract from its emphatic endorsement of the coastline as the primary principle. In short, this is a totally inadequate ground for repudiating the rule.

2. The Court refers to 'this method of the *tracé parallèle*' as if it was the same thing as a base-line following the tide-mark along the sinuosities of the coast, whereas *tracé parallèle* concerns *the outer limit of territorial waters*. This is a fundamental confusion and, in any event, the so-called 'method of *tracé parallèle*' is not really a method of delimiting even the outer limit of territorial waters. *Tracé parallèle* was an expression coined by Gidel¹ to describe a *misconception* which he believed some writers to have in regard to the outer rim of territorial waters. The misconception is that the outer rim is a line drawn parallel to the shore-line and *exactly reflecting each and every sinuosity of the shore* (see Fig. 1 of the illustration on p. 134). This so-called method is wholly impractical and, as far as is known, has never occurred in state practice. It is impractical because, under *tracé parallèle*, it is not possible to ascertain whether a given position at sea is within territorial waters simply by measuring three miles (assuming a three-mile limit) from the nearest point of land.² It is necessary first to

¹ Gidel, vol. iii, p. 594; and see the illustrations inserted at the end of that volume. See also Boggs in *A.J.I.L.* 24 (1930), p. 546.

² Under *tracé parallèle* a point on the outer limit may, in the case of sinuosities, be three miles from its reciprocal point on shore and yet be less than three miles from some other point on the shore; see the illustration of *tracé parallèle* in Fig. 1 on p. 134.

carry out the tricky task of tracing on the chart a faithful replica of the sinuosity of the shore-line at three miles' distance from the shore. The method of drawing the outer limit of territorial waters was never really discussed before 1930. This does not mean that there was no rule. On the contrary, the rule was simply that a state is entitled to treat every position at sea within three miles of any point of its land as within its territorial waters. To apply the rule you take a pair of dividers (compasses) opened to give a three-mile measurement and then draw a three-mile arc either from the

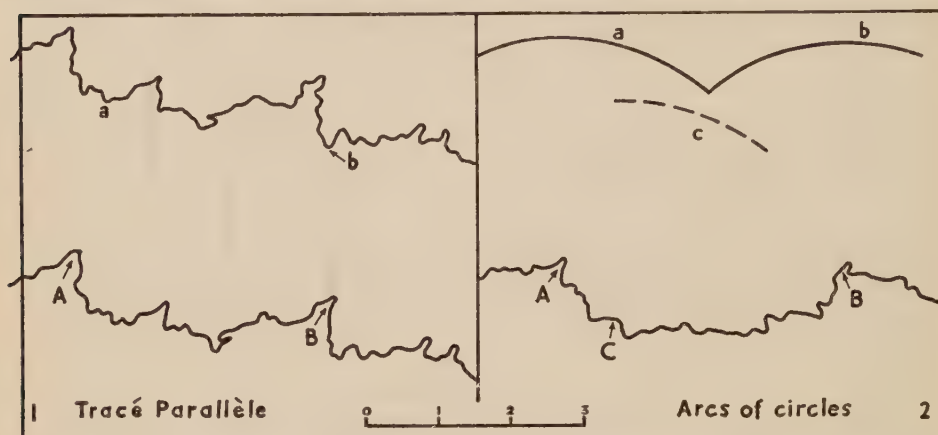


FIGURE 1 illustrates *tracé parallèle*. Points *a* and *b* on the outer limit are only about two miles from their nearest points of land, *A* and *B*, although the outer limit is drawn parallel to the coast at three miles' distance.

FIGURE 2 illustrates arcs of circles and shows the smooth curve of the outer limit as compared with the coastline. Arcs *a* and *b*, taken from the prominent points *A* and *B* on the land, determine the outer limit. Arc *c* taken from point *C* within the curve of the coast is irrelevant because it is overreached by arcs *a* and *b*.

land towards the given position at sea or from the position at sea towards the nearest points of land. If the arcs fall short, the position at sea is not within territorial waters. The beauty of the procedure is that it is unnecessary to draw the outer limit of territorial waters at all and the base-line is simply the shore or the closing line of inland waters.¹ That this was the procedure found in state practice is demonstrated by the fact that very few states indeed ever drew either the outer limit of their territorial waters or their base-line. Without a precise delimitation of territorial waters, the only possible course is to determine the outer limit by taking three-mile arcs from the land. Technicians call this procedure drawing 'arcs of circles',² but

¹ Under the ten-mile rule for bays, it is only necessary to specify the closing line if there is doubt about its precise position.

² Technicians describe the outer limit of territorial waters when drawn all along the coast by arcs of circles as the 'envelope' of all the arcs of circles taken from the coast. 'Envelope' is a geometrical term denoting a curve forming a common tangent to a number of other curves arranged on a fixed principle. See the illustrations at the end of Gidel, vol. iii, and Boggs, loc. cit., p. 546.

there is no mystery about the procedure. It is nothing but the application to territorial waters of the method used by seamen the world over for measuring distances at sea (see Fig. 2 of the illustration opposite).

3. The Court states that the *tracé parallèle* method was invoked by the United Kingdom in the Memorial but abandoned in the written Reply. This statement is incorrect. The United Kingdom, having accepted Norway's four-mile limit, addressed its whole argument in the Memorial to the base-line. It did not deal either with *tracé parallèle* or with 'arcs of circles' which concern the outer limit. *Tracé parallèle* was introduced by Norway in the Counter-Memorial in an oblique attempt to undermine the authority of the tide-mark rule *for the base-line* by suggesting divergencies—which have not in fact existed—in the delimitation of the *outer rim* of territorial waters.¹ Norway did not refer to state practice, in which there is no evidence of any difficulty, but cited passages from Gidel² and from the American geographer Boggs³ condemning the *tracé parallèle* 'method' and approving 'arcs of circles'. The United Kingdom at once said that no such 'method' as *tracé parallèle* exists in state practice and that Gidel and Boggs were obviously right in approving 'arcs of circles'. At the same time, it emphasized the irrelevance of the method of delimiting the *outer rim* in a case dealing only with *base-lines*.⁴ In this state of the pleadings, the Court's assertion that the United Kingdom invoked *tracé parallèle* seems to confirm that it confused *tracé parallèle* of the outer limit with a base-line following the tide-mark along the shore.

4. The Court states that the 'arcs of circles' method is a *new technique* for delimiting the territorial sea and implies that it was first introduced by the United States delegation at the 1930 Conference. There was, however, evidence before the Court that the arcs of circles procedure was well known long before 1930 as a technique for delimiting territorial waters. First, the chart used in 1927 by the Norwegian courts in the case of *The Deutschland*⁵ shows the defendant's version of Norway's outer limit drawn along the coast by arcs of circles. Then, Norway's own *1912 Report* referred to the arcs of circles procedure as the alternative procedure if the Norwegian system of straight lines was not employed.⁶ Again Fulton's book,⁷ published in 1911, contains charts, including a chart of the Norwegian coast, showing the outer limit drawn by arcs of circles and, as Judge McNair pointed out

¹ Counter-Memorial, paras. 289-95.

² Gidel, vol. iii, pp. 504-5.

³ *A.J.I.L.* 24 (1930), p. 542.

⁴ Written Reply, paras. 183-7.

⁵ The chart was exhibited in the United Kingdom's Memorial Annex 8. It was also referred to by Judge Berg in the Supreme Court.

⁶ See pp. 48-49.

⁷ Fulton, *op. cit.*, p. 670: see also pp. 654 and 719 where, however, the scale is too small for the arcs to be distinct all along the coast.

(p. 161), the procedure is implicit in numerous prize cases going back to Lord Stowell. Indeed it is implicit in all measurements of the territorial sea back to the seventeenth century. Whether the measure be range of vision, cannon shot, or a numerical limit, the inevitable procedure is to take points on the shore and swing the arcs of vision, cannon fire, or fixed distance out to seaward. The American proposal in 1930 was not even the first technical formulation of the procedure.¹ The Court had before it the records of the 1925 Anglo-Norwegian Conference which include a memorandum setting out the British understanding of the principles for delimiting Norway's territorial waters and the 'arcs of circles' procedure is there fully described.²

5. The Court states that the purpose of the 'arcs of circles' procedure is to 'secure the application of the principle that the belt of territorial waters must follow the line of the coast'. This statement again seems to show some misunderstanding of technical matters. The procedure assumes that the *base-line* follows the line of the coast and gives the coastal state *all waters which lie within three miles of that base-line*. Any point at sea covered by a three-mile arc from any point on the coast belongs to the coastal state. Thus, the purpose of the 'arcs of circles' procedure is to ensure that the coastal state obtains the maximum waters which can be covered by its three-mile limit. *Where there are sinuosities, it does not secure that the outer limit continuously follows the line of the coast. Under 'arcs of circles' procedure the outer limit does not reproduce the sinuosity of the base-line*. The reason is that in minor sinuosities three-mile arcs taken from the promontories intersect and render irrelevant any arcs drawn from points on the shore within the fold of the sinuosity, as can be seen from Fig. 2 on p. 134 above. The outer limit takes the form of broad curves which smooth out the minor sinuosities found in the base-line.³

6. The Court states that the 'arcs of circles' procedure was admitted by the United Kingdom not to be 'obligatory by law'. It might have added that the United Kingdom said in the very next sentence that the procedure is one which states 'naturally adopt'.⁴ Counsel, indeed, said *that there is no other procedure for a state to adopt if it wishes, as it always does, to make the most of its right to three miles of water out to sea from the land*.

¹ The United States delegation did introduce a proposal for the general elimination of small pockets of open sea left after drawing arcs of circles. This proposal really was a 'new procedure', and it was not accepted. See Gidel, vol. iii, pp. 510-11, and Boggs in *A.J.I.L.* 24 (1930), pp. 548 ff.

² Annex 7 of the Memorial (Annex 10 of the 1925 records).

³ See, for further example, the illustrations at the end of vol. iii of Gidel, and Boggs, loc. cit., p. 546.

⁴ Oral Reply, 18 October. Even Norway, when she put the 1935 line on the charts standing before the Court, used arcs of circles to draw the outer limit at the angles of the base-line, for the simple reason that no one ever thinks of doing anything else where the base-line is not a straight line.

7. The Court states that certain of the United Kingdom's 'Conclusions' submitted at the hearing were founded on the 'arcs of circles' method. But none of the United Kingdom's 'Conclusions' *relating to the base-line, which was the only issue litigated in the case*, was founded on the arcs of circles method of drawing the outer limits.

Thus perished the rule of *the low-water mark along the coast* which, it is no exaggeration to say, had behind it as much authority in state practice and in juristic opinion as any customary rule that has ever been canvassed before an international tribunal. It was buried under misunderstandings concerning the procedure for drawing the outer limit, which was not in issue in the case. The low-water mark continues only as the legal criterion for determining the outermost point of the land *where this may be relevant*. 'This criterion', said the Court,¹ 'is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory.' But, if appurtenance to the land be the basic principle, it may legitimately be asked whether that principle finds truer expression in a system of straight lines which occasionally touch extreme pin-points of land or in a line which in general follows the tide-mark along the land.

The disappearance of the fundamental principle of the coastline rule necessarily deprives the former law relating to the exceptions of much of its significance. We shall not, however, appreciate the Court's own formulation of the law of base-lines unless we first see how it dealt with the arguments of the Parties concerning bays and coastal islands.

Bays

The rule for bays was formulated in Sub-committee No. II's report as follows:²

'The belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than 10 miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed 10 miles.'

Observations. . . . 'In the case of an indentation which is not very broad at its opening, such a bay should be regarded as forming part of the inland waters. Opinions were divided as to the breadth at which this opening should be fixed. Several delegations were of opinion that bays, the opening of which did not exceed 10 miles should be regarded as inland waters. . . . Other delegations were only prepared to regard the waters of a bay as inland waters . . . if the opening did not exceed twice the breadth of the territorial sea. . . . Those who supported this opinion were afraid that the adoption of a greater width for the imaginary lines traced across bays might undermine the principle enunciated in the preceding article, (i.e. the tide mark along the coast) so long as the conditions which an indentation has to fulfil in order to be regarded as a bay remain undefined. *Most delegations agreed to a width of 10 miles provided a*

¹ At p. 128.

² Plenary Meetings, p. 131.

system were simultaneously adopted under which slight indentations would not be treated as bays.'

In short, most delegations were prepared to accept a ten-mile limit, *instead of a smaller limit*, as the general rule only if a bay were to be so defined as to make it impossible for states to treat minor curvatures as bays. The clear implication is that the majority were entirely opposed to any system of straight base-lines drawn from point to point along the coast regardless either of the length of the lines or of the depth of the curves in the coast.

The United Kingdom emphasized that, in its view, the ten-mile limit for bays was not in issue, since it had admitted on historic grounds Norway's title to all her fjords and sunds regardless of size.¹ The Court, nevertheless, dealt with the point and apparently held that there is no fixed limit in customary law (p. 131):

'Although the 10 mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the 10 mile rule has not acquired the authority of a general rule of international law.

'In any event the 10 mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.'

That is all. The Court passed over in silence the preparatory work and proceedings of the 1930 Codification Conference, and the draft codes of the learned societies, which all testify to the strength of the opinion in 1930 that international law imposes some general limit—a limit of the order of ten or twelve miles—on the width of inland bays, except in the case of an historic title. Nor did the Court explain what practice it had in mind when it referred to other states having 'adopted a different limit'. Did it have in mind only states which have adopted a different *general* limit or did its *dictum* also embrace claims to individual larger bays? A very few states, e.g. Yugoslavia,² have adopted a twelve-mile limit and, in addition to Norway, one or two states in very recent decrees have claimed all bays regardless of width, e.g. Saudi Arabia and Egypt.³ But majority practice and opinion have been on the side of some general limit for inland bays, with exceptions for 'historic waters'. Indeed, Gidel insisted that a rule imposing a general limit is 'peremptorily proved' by the very existence of a category of historic bays.⁴ Norway⁵ herself protested in 1922 against a Soviet decree

¹ Opening Speech, 25 and 27 September 1951; Reply, 18 October.

² Annex 112 of the Rejoinder.

³ Dated 1949 and 1951 respectively (*ibid.*).

⁴ Gidel, vol. iii, p. 537.

⁵ The substance of Norway's protest was given in the United Kingdom's Oral Argument (26 September 1951).

enclosing the White Sea by a line drawn between Capes Svyatoi and Kanin as being an extension which went further than was warranted by international law. She would only recognize a line 'within a reasonable boundary', 'drawn nearer in' and '*at a point where the distance between the coasts is appreciably less*'.

The other side of the picture is that state practice in regard to bays has been much less uniform than it has been in regard to the low-tide mark along the open coast. Counsel for Great Britain in the North Atlantic Fisheries Arbitration¹ in 1910 argued at great length that there is no general rule governing bays, and there are *dicta* of English judges to the same effect as late as *The Fagernes* in 1927.² This does not mean that His Majesty's Government at that period considered all bays to be open to appropriation regardless of their size. Statements in Parliament in 1907³ and 1908⁴ and by the Attorney-General in *The Fagernes* are evidence to the contrary. But the divergences in British views are difficult to reconcile with the existence of a definite rule imposing a ten-mile limit already recognized before 1930. At the 1930 Conference the United Kingdom advocated a six-mile limit, but in Sub-committee No. II alined itself with the majority who favoured the ten-mile rule of the Fishery Conventions. Before the Court the contention of the United Kingdom was that a customary rule for bays, which was in process of formation in the nineteenth and twentieth centuries, crystallized at the 1930 Conference as a ten-mile rule for ordinary bays.⁵ Norway, on the other hand, in Annex 112 of its Rejoinder, submitted a long list of all the larger bays in the world known by her to have been claimed as inland waters. The number of these claims to individual bays is certainly impressive, but, equally, it is very small compared with the total number of bays on the coasts of the states making the claims. However that may be, the Court, faced with an uncertain practice, has simply declared that the ten-mile limit has not the status of a rule of customary law, *without suggesting that any other limit exists*.

Even a rule which allows all bays to be treated as inland waters regardless of the width of the entrance would not cover the Norwegian system of drawing long base-lines from point to point along the coast *outside the entrances of the individual bays*. It was here that the United Kingdom made its stand after having admitted Norway's historic title to all her fjords and sunds regardless of size. The United Kingdom maintained that the concept of inland waters in international law is of waters substantially enclosed within the territory of the coastal state by the configuration of the land. In

¹ See especially Sir Robert Finlay, British Oral Argument.

² [1927] P. 311.

³ House of Lords, Lord Fitzmaurice (*Hansard*, 4th Series, vol. 169, col. 989).

⁴ House of Commons, Sir E. Grey (*ibid.*, vol. 191, col. 1771).

⁵ United Kingdom's Written Reply, pp. 280-2.

East Finnmark, where there is no island fringe, even an historic title to treat all the fjords as inland waters regardless of their size must, therefore, be confined to waters enclosed within the headlands of the individual bays. This meant, of course, that the existence of a legal concept of a bay was essential to the United Kingdom's case.

Legal definition of a bay. According to the United Kingdom, the legal concept of a bay is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to make the indentation more than a mere curvature of the coast. In other words, the legal definition of a bay concerns the geographical configuration of the shore and depends essentially on the proportion between penetration inland and width of entrance. Norway, on the other hand, denied that the legal concept of inland bays is purely—or essentially—geographical:¹

'The Norwegian Government has never sought to deny that there is a distinction to be made between those bays which must be considered as forming part of the land (such as the fjords of Norway) and those which, on the contrary, have the appearance of the open sea (for instance the Bay of Biscay).

'What is disputed is the existence of a criterion which will enable bays to be classified mechanically in one or the other category. *Each bay has its own characteristics which are determined by various circumstances relating to geography, history, politics and economics.*'

The Norwegian theory of bays was based on two well-known passages in the Award in the North Atlantic Fisheries Arbitration. The Tribunal rejected a United States argument that the three-mile limit ought to be applied systematically even in bays:²

'Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus, conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereign, this tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the 3-mile rule.'

In the second passage the Tribunal said that it understood the word 'bay' to be used in the Treaty of 1818 in a geographical sense, and to mean 'an indentation of the coast, bearing a configuration of a particular character easy to determine specifically but difficult to describe generally'. It then went on:³

¹ Norwegian Rejoinder, para. 389.

² Wilson, *Hague Arbitration Cases*, p. 182.

³ Ibid., p. 186.

'The negotiators of the Treaty of 1818 . . . most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of the shores, the distance which it is secluded from the highlands of nations on the open sea and other circumstances not possible to enumerate in general.'

Norway contended that the 1910 Tribunal regarded geographical configuration simply as one of several elements in the definition of a bay and not as the critical element. The United Kingdom, on the other hand, urged that the Tribunal regarded the geographical configuration of the land and the penetration of the sea into the coastline as fundamental to the concept of a bay *from which result the special defence, economic, and other interests of the coastal state*. In other words, while defence, economic, and other considerations may be reasons for allowing bays to be treated as national territory, the legal concept of a bay depends essentially on geographical configuration. Certainly the legal concept of a bay was so regarded at the 1930 Codification Conference, the discussion being entirely devoted to the problem of framing a strict geographical definition of a bay for legal purposes.¹

The Court's views concerning the law of bays are not easy to state with certainty—except that it rejected the ten-mile rule. In one passage² it referred without disapproval to the fact that some states—in fact, only one or two—have used straight base-lines 'not only in the case of well-defined bays, but also in cases of *minor curvatures of the coastline where it was solely a question of giving a simpler form to the belt of territorial waters*'. Again, its 'general direction of the coast line', as will subsequently appear,³ allows very little room for any distinct rule for bays. Yet elsewhere⁴ the Court referred to the close connexion between sea areas and the land domain as being 'at the basis of the *rules* relating to bays'. And, when dealing specially with a base-line 38.6 miles long drawn between Cape Nord Kyn and the North Cape and across the long curving basin of the Svaerholthavet⁵ the Court upheld the line on the ground that the Svaerholthavet forms part of a bay. Seven separate fjords debouch from this basin which, measured from the mouths of the fjords, has a depth of only 11.5 miles. But the deepest fjord, Porsangerfjord, is seventy-five miles long. The

¹ See Plenary Meetings, p. 132, for geometrical formulae proposed by the United States and French delegations as definitions of a bay for legal purposes. See also Boggs in *A.J.I.L.* 24 (1930), p. 541; Gidel, vol. iii, pp. 584-92; and Munch, *Die technischen Fragen des Küstenmeers* (1934), p. 97.

² At p. 130.

⁴ At p. 133.

³ See p. 155 below.

⁵ At p. 141; the Svaerholthavet lies between base-points 11-12. The scale of the figure on p. 115 is too small to show all the seven fjords which debouch from the basin of the Svaerholthavet.

Court, *applying the geographical criterion of proportion between penetration inland and width of mouth*, treated the whole complex, consisting of the external basin plus the seven fjords, as a single bay and held the 38·6-mile base-line to be merely the natural closing line of this bay. Furthermore, it refused to treat the LoppHAVET¹—an extensive area dotted with islands—as a bay, on the ground that it is geographically ill defined, although at the same time it upheld the base-line as being drawn in accordance with the general direction of the coast. Consequently, the Court apparently held that the concept of a bay is essentially a matter of geographical configuration and that there is some rule of international law governing bays. To the question, what is the rule for bays which international law recognizes, the Court gave no clear answer, unless it be that, where there is a bay, you may always draw a line across the mouth.

Coastal islands

The effect of coastal islands on the delimitation of coastal waters has two aspects. First, is it legitimate to treat the islands as part of the mainland coastline, or must they be treated as separate units? Secondly, if they rank as part of the mainland, how is the base-line to be drawn? The general principle undoubtedly is that islands have their own territorial waters and their own base-lines, but there is a good deal of authority, which goes back to Lord Stowell, that under certain conditions coastal islands may be counted as part of the mainland. In *The Anna*² Lord Stowell described mud islands lying in the mouth of the Mississippi as a 'kind of portico to the mainland' and as 'natural appendages of the coast'. Whether rightly or wrongly, these phrases were afterwards interpreted on a number of occasions as indicating that he considered coastal islands to constitute an outlying fringe of the mainland coast under certain conditions.³ At any rate, there is now a considerable body of state practice supporting such a principle. For example, both the United States⁴ and Great Britain⁵ appear to have accepted the principle in regard to the Cuban Cays in the years 1862-3. More modern practice based on this principle includes a French Decree of 1911 for New Caledonia, Neutrality Decrees of the four Scandinavian states in 1912 and 1938, the Russo-Finnish Treaty of Dorpat of 1920, and decrees of Iran 1934, Ecuador 1938, Yugoslavia 1948, Saudi Arabia 1949, and Egypt

¹ At p. 141; the LoppHAVET lies between base-points 20, 21, and 22 shown in the figure on p. 115. See also p. 146 below.

² (1805), 5 C. Robinson, p. 373.

³ For example, in the precedents cited in the next three succeeding footnotes. See, however, the United Kingdom's Written Reply, para. 289.

⁴ Moore, *Digest* (1906), vol. i, p. 711.

⁵ Smith, *Great Britain and the Law of Nations* (1935), vol. ii, pp. 221-4; see also Hall, *International Law* (8th ed., 1926), p. 149.

1951.¹ The United Kingdom, having admitted that Norway possesses an historic title to all her fjords and sunds, conceded that this involved the islands of the Skjaergaard on the west coast being treated as part of Norway's coastline.

On the west, as on the east, coast the United Kingdom made its stand on the point that even an historic title to fjords and sunds did not enable base-lines to be drawn from islet to islet round the coast *without regard to the configurations of the fjords and sunds*. It challenged Norway on the second aspect of the problem, the delimitation of the base-line along an island coastline. It maintained that, treating the islands as projecting parts of the mainland, you still must follow the line of the coast. The straight lines of the 1935 Decree along the Skjaergaard do not follow the configurations of the island coastline and do not close the entrances of individual indentations in the island coastline. They are drawn simply from one islet to another and frequently pass outside the line of the island coast, thus including within inland waters areas which are not in a true sense enclosed by the configurations of the land. The United Kingdom contended that the precedents which justify the treatment of islands as part of the mainland coast do not support the drawing of arbitrary base-lines by the method used in the 1935 decree. Apart from the Norwegian decrees of 1869, 1889, and 1935 there is hardly any state practice until after the Second World War which specifically provides for the drawing of straight lines even across the actual indentations between islands. Neutrality decrees of the King of Hawaii² in 1854 and 1877 scarcely count as state practice. Perhaps the most important precedents³ were French decrees of 1888 and 1938⁴ which, purporting to apply the ten-mile rule for bays, certainly make a very free use of ten-mile lines from the shore out to islets at sea in cases where the waters are not in a true sense bays. These French decrees may have had an important influence on the Court because they do on a small ten-mile scale what Norway's decrees do on a much larger, almost unlimited, scale. But it makes a vital difference that the lines are subject to a ten-mile limit. Sweden and Denmark, though using an island coast as the foundation for their base-lines, did not prescribe straight lines drawn arbitrarily from point to point without regard to the bays and indentations in the island coast.⁵

The proceedings of the 1930 Codification Conference and the work of the learned societies preparatory to the Conference equally do not support a rule allowing straight base-lines to be drawn from one extreme coastal

¹ Annex 112 of the Norwegian Rejoinder.

² Crocker, *The Extent of the Marginal Sea* (1919), pp. 595-6.

³ There was also an Ecuadorean decree of 1938 apparently claiming to draw lines all round the Galapagos archipelago and a fifteen-mile territorial belt as well.

⁴ Annex 112 of the Norwegian Rejoinder.

⁵ See Swedish and Danish replies to the Committee of Experts at the 1930 Conference (Bases of Discussion, pp. 123 and 189).

island to another regardless of the position and configuration of the islands. The drafts of the International Law Association (1926), of the Japanese International Law Association (1926), and of the Harvard Research Committee (1929) contained no special rule at all for coastal islands or ocean archipelagos.¹ The drafts of the American Institute of International Law and the Institute of International Law, however, accepted the principle that islands of a group, whether a coastal or an ocean group, should be treated as a unit and the territorial sea measured from the outer islands.² The Institutes required the intervals between the islands not to exceed twice the width of territorial waters. The views of governments in their replies to the League of Nations Committee of Experts were divided, some governments rejecting a special régime for archipelagos altogether, others admitting it, though in diverse forms. The Committee of Experts suggested the following rule:³

‘In the case of a group of islands which belong to a single State and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters.

‘The same rule shall apply as regards islands which lie at a distance from the mainland not greater than twice the breadth of territorial waters.’

The suggested rule contained a limit of width between the islands of an archipelago and gave the waters the status of *territorial, not inland, waters*. The status of territorial waters was prescribed because of the need to preserve the right of innocent passage through channels between islands which not infrequently are important to international navigation. At the Conference the question of groups of islands was dealt with in Sub-committee No. II, which, however, was unable to formulate any rule owing to differences of opinion and to the technical difficulties inherent in the problem of defining an archipelago for legal purposes. The Sub-committee’s report contains only the following *Observation* concerning archipelagos:⁴

‘With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the Sub-Committee was of opinion that a distance of ten miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea. Owing to the lack of technical details, however, the idea of drafting a definite text on this subject had to be abandoned. The Sub-Committee did not express any opinion with regard to the nature of the waters included within the group.’

Unquestionably, there was a marked tendency in 1930 to favour the introduction of a special rule for archipelagos, whether coastal or ocean, but

¹ See *A.J.I.L.* 23 (1929), Supplement, pp. 250, 373, and 376.

² *Ibid.*, pp. 368 and 371.

³ *Bases of Discussion*, p. 51.

⁴ *Plenary Meetings*, p. 133.

subject to a limit of width between the islands and with a strong reservation by some states against the waters being treated as *inland waters*. It also seems clear that the rule was discussed in 1930 as a new rule to be introduced *de lege ferenda*. Gidel, who was a member of Sub-committee No. II, afterwards expressed the view that until a new rule was framed the general law of territorial waters applied.¹

Even the state practice of the post-war period, on which Norway specially relied, provides very slender authority for a general rule allowing the application of the Norwegian system to coastal islands. The new decrees of Yugoslavia (1948), Saudi Arabia (1949), and Egypt (1950)² prescribe a limit of twelve miles for lines drawn between islands or between an island and the mainland. Iceland³ in 1950, i.e. after the United Kingdom had instituted proceedings against Norway, issued a decree which was deliberately modelled on the Norwegian system of base-lines. This Decree was confined to Iceland's northern coast where the foreign fishing is mainly done by Norwegians whose Government was in no position to protest. Even so, four protests had been lodged against the Icelandic Decree before the proceedings in the Anglo-Norwegian case closed—by the United Kingdom,⁴ the Netherlands, Belgium, and the Federal Government of Bonn.⁵

It is now time to examine the views expressed by the Court. In a passage previously quoted⁶ the Court described the skjaergaard as 'but an extension of the Norwegian mainland'. It there said that the mainland coast of Norway does not constitute a clear dividing line between land and sea, but that the coastline of Norway is really the outer line of the skjaergaard. In a second passage it held that the skjaergaard must in law be treated as Norway's western coast (p. 128):

'The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the "skjaergaard". Since the mainland is bordered in its western sector by the "skjaergaard", *which constitutes a whole with the mainland*, it is the outer line of the "skjaergaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. *This solution is dictated by geographic realities.*'

This ruling has the support not merely of 'geographic realities' but of *state practice* which, as indicated above, allows islands to be treated as part of the mainland coast under certain conditions. The Court makes the unity of the islands with the mainland the determining factor and the passage makes it clear that it is *geographical unity* which the Court had in mind.

¹ Gidel, vol. iii, p. 717.

² Annex 112 of the Norwegian Rejoinder.

³ Ibid. Cf. an Ecuadorean decree of 1951 in the same Annex.

⁴ Filed with the Court in a letter before the hearing.

⁵ Read to the Court at the Oral Hearing.

⁶ See p. 116 above.

Afterwards, the Court dealt with the drawing of the base-line along the island fringe (p. 130):

'It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the skjaergaard, and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks across the sea areas separating them, even when such areas do not fall within the concept of a bay. It is sufficient that they should be situated between the island formations of the skjaergaard, *inter fauces terrarum*.'

The contention of the United Kingdom is not given correctly in this passage. It did not maintain that Norway was entitled to draw straight lines only across bays. It expressly conceded that international law does permit a state under certain conditions to draw straight lines across indentations between islands which are not bays *stricto sensu*. Its contention was that a state may only do this when the waters are enclosed by the territory of the islands and the mainland in a manner *analogous* to the *fauces* of a bay. Maintaining that the concept of inland waters is limited in international law to waters enclosed within the land, it maintained that this limitation *must be at least equally valid for waters within island formations*. A state, argued the United Kingdom, cannot be entitled to enclose larger areas of sea in virtue of the discontinuous *fauces* of island formations than in virtue of the solid, continuous *fauces* of a mainland shore.¹ Indeed, if the word 'necessary' is substituted for the word 'sufficient' in the Court's last sentence, i.e.:

'It is *necessary* that they [the sea areas] should be situated between the island formations of the skjaergaard, *inter fauces terrarum*,'

the sentence would exactly express the contention of the United Kingdom. The real difference between the Court and the United Kingdom in regard to island indentations, as in regard to bays, lies in what may properly be considered to be waters situated *inter fauces terrarum*.

The Court adopted an extremely liberal view of waters *inter fauces terrarum* along the skjaergaard, as can be seen in its treatment of the LoppHAVet basin,² 'an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords'. The base-line across this sea area starts from a rock near the island of Soroy (base-point 20), runs to an isolated submerging rock forty-four miles distant (base-point 21) and thence runs a further eighteen miles to another rock three and a half miles away from the island of Kvaloy (base-point 22). A large area of sea within this sixty-two-mile line is open water but was held by the Court on *geographical grounds alone* to be inland waters

¹ Written Reply, para. 362; Oral Argument, 27 September 1951.

² See figure on p. 115, points 20-22.

and therefore, presumably, *inter fauces terrarum*. Hill J.¹ once asked: 'What is the metaphor, the open mouth of a man or of a crocodile?' But no mere saurian can now supply the answer to his question.

The Court also expressly rejected the idea that the joining of straight lines between units of an archipelago is subject to any definite limit on the length of the lines (p. 131):

'Basing itself on the analogy with the alleged general rule of 10 miles relating to bays, the United Kingdom still maintains on this point that the length of straight lines must not exceed 10 miles.

'In this connexion, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or 10 or 12 sea miles) have not gone beyond the stage of proposals.'

The United Kingdom did not, in fact, base itself only on the analogy with bays but also on the strong opposition at the 1930 Conference to allowing any special régime for islands except under a limit of width. The Court speaks of attempts to subject groups of islands or coastal archipelagos to limitations analogous to those relating to bays not having 'gone beyond the stage of proposals'. Another view, as shown above, is that attempts in 1930 *to introduce any special régime at all* for groups of islands or coastal archipelagos did not get beyond the stage of proposals—a very different state of affairs. *Even these proposals were on the basis of an absolute limit on the width of the intervals between islands.* However, as the Court held that there is no general limit on the width of inland bays, it was logical to reach the same conclusion about indentations in coastal islands. In any event, the United Kingdom, having admitted Norway's historic title to fjords and sunds, conceded that the base-lines along the skjaergaard need not be limited in length to ten miles. Its complaint was that the 1935 lines are drawn arbitrarily from islet to islet and pass outside the entrances of the fjords and sunds, enclosing sea areas which are not inland waters.

The new 'general direction of the coast' rule

The Court introduced its own rule in the following passage (p. 129):

'The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle several States have deemed it necessary to follow the straight base-line method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in the case of minor curvatures

¹ *The Fagernes*, [1926] P. 185, at p. 189.

of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.'

The Court appears here to justify its adoption of the 'general direction of the coast' rule by reference to a use of straight base-lines by a handful of states, most of them very recently, whose practice has been discussed in connexion with coastal islands.¹ The statement that these states have used straight lines *in order to apply* the 'general direction of the coast' principle—a principle described by Judge Hsu Mo² as *one of Norway's own adoption*—is open to question. They appear, Iceland excepted, to have acted rather in purported application either of the rule for bays or of Sub-committee No. II's suggested rule for islands and, for the most part, subject to a limit of ten or twelve miles on the length of the lines. Whatever was the principle acted on by these states, their practice does not go nearly as far as the rule laid down by the Court. To say that this practice met with no objection of principle by other states is a somewhat strong statement in view of the clear opposition to anything like it at the 1930 Conference,³ quite apart from the individual protests of some states which were before the Court. *At best, the Court appears to have made a minority practice the basis of a general rule of customary law.*

The Court stated its criteria of the legality of base-lines in three further passages describing these criteria as 'adequate, if not entirely precise', guides for Courts which are called on to adjudicate on base-lines (p. 133):

'Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base lines must not depart to any appreciable extent from the general direction of the coast.'

This passage allows the coastal state liberty to make minor departures even from the general direction of the coast to meet practical needs. Its broad purpose however is restrictive. It attempts to bring the new rule into line with the basic principle of territorial waters accepted by everybody, namely, that they are *appurtenant* to the land. Hence, although the 'land' under the Court's rule may take the form of a series of widely spaced pinhead base-points, the general direction of the coast must be maintained (subject to minor departures).

Next it said (*ibid.*):

'Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely

¹ See pp. 143-5 above.

² Individual Opinion, *I.C.J. Reports*, p. 154.

³ See p. 138 above.

linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.'

Here the close relationship—the close link—between the sea areas and the land domain seems to be primarily geographical. That the Court had geographical factors in mind is strongly suggested by the reference to 'land formations which divide or surround them' and the reference to 'bays'. It is confirmed by the next paragraph in which the Court refers to a consideration 'which extends *beyond purely geographical factors*'. The Court seems, indeed, to be here describing the sea areas which, in its view, may properly be considered to lie *inter fauces terrarum*—the test which, in connexion with islands, it said was sufficient to make them inland waters.

Then the Court added (*ibid.*):

'Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.'

The Court followed this passage with an examination of Norway's claim to a 'traditional system of delimitation'. The Court did not here explain in what way economic interests evidenced by long usage operate as a 'criterion' or the relation of this criterion to the 'general direction of the coast' rule. The explanation is perhaps to be found in the Court's use of economic and historic considerations as an alternative ground for upholding the 1935 line across the LoppHAVET. The Court, as previously stated,¹ considered the long line sealing off this 'extensive area of water dotted with large islands' to be drawn in conformity with the general direction of the coast and to be valid on geographical grounds alone. But it added that, even if the line were considered to depart too much from the general direction of the coast, Norway still relied on historic fishing rights specifically referable to the LoppHAVET. It seems to have treated Norway's economic-historic interest as a supplementary factor confirming and, if necessary, actually legalizing a line the conformity of which with the general direction of the coast might on purely geographical grounds be open to argument.²

The Court's criteria of the legitimacy of claims to inland waters are so flexible that they make the validity of many claims a matter of guesswork. The general *line* of the physical coast might have afforded a fairly precise and a more workable test. The general *direction* of the physical coast leaves much to mere opinion and everything depends on the scale on which sections of the coast are viewed when considering their general direction. Here, however, the Court has given further guidance which actually magnifies the

¹ See p. 146 above.

² *I.C.J. Reports*, p. 142.

subjective element in the geographical test. Speaking of the 1935 line across the LoppHAVet, the Court said (p. 141):

'The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, *however justified the rule in question may be, it is devoid of any mathematical precision.* In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast. *Therefore one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone.* In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the Norwegian coast.' *due to be covered by my first case*

In this passage the Court not only admits the lack of precision in its geographical test but, by encouraging the use of small-scale charts, invites differing interpretations of the 'general direction of the coast' rule.

In another passage the Court said that under the rule base-lines must be drawn 'in a reasonable manner'. But reasonableness is again a subjective test, being dependent on the scales and standards which are adopted *and on the weight given to the interests of other states in the freedom of the seas.* All we know is that the scales and standards which the Court applied were by no means ungenerous to the coastal state. In the case of the LoppHAVet¹ a line sixty-two miles long, passing to seaward of an island-dotted area and merely touching one submerging rocklet on the way, was described as having been 'kept within the bounds of what is moderate and reasonable'. In the case of the SvaerholthAVet,² seven bays were treated as one bay and a line 38.6 miles long was allowed. The Court in the result upheld the whole 1935 line as strictly in accordance with its rule, *without recourse to Norway's historic title.*

It therefore seems inescapable that the 1935 line is a precedent for the application of the 'general direction of the coast' rule in other cases where the coast is of comparable complexity. Indeed, the Court in formulating its general rule seems to have taken its chief inspiration actually from the Norwegian system. Following the general direction of the coast was mentioned as one of the elements of the Norwegian system in the Exposé des Motifs of the 1869 decree. It is also mentioned in some of the modern cases involving British vessels, notably in *The St. Just* where it was emphasized by Judge Klaestad,³ although it was not referred to *expressis verbis* in the Norwegian memoranda for the 1930 Codification Conference. Torsten Gihl⁴ represents it to be Swedish practice but makes it plain that following the general direction of the coast *in the case of a bay means joining*

¹ See p. 146 above.

² See pp. 141-2 above.

³ See p. 124 above.

⁴ Annex 112, No. 29 (c), of the Norwegian Rejoinder.

the headlands of the bay. Otherwise, it is not easy to find any reference to the formula adopted by the Court except in the Award of the arbitral tribunal in 1909 in the case of the Maritime Frontier between Norway and Sweden (*Grisbadarna* case).¹ Having to delimit the frontier between the two countries extending from the land boundary, which had been fixed in 1661, to the outer limit of territorial waters, the Tribunal² decided in principle upon a line 'perpendicular to the general direction of the coast'. The issue was not the same as in the recent case but the general direction of the coast was taken by the Tribunal as the base from which the perpendicular dividing-line must be drawn. The Tribunal, however, adopted a line perpendicular to the general direction of the coast as the dividing line only because it was thought to be more in accord *with seventeenth-century ideas than the modern principles of the median line or of the thalweg*. The median line principle which is commonly recognized to be the method of division applicable today in the absence of a navigable channel calling for the thalweg principle, does not take the general direction of the coast as the base-line. On the contrary, its principle is delimitation by arcs taken from the nearest points of land.³

A line drawn between the two headlands of a bay does, it is true, follow the general direction of the coast, but in a different sense from that of the Court's rule. A line joining the headlands of a bay is more properly said to follow the general *line* of the coast. Norway's historic title to fjords being admitted, it was the general *line* of the coast for which the United Kingdom contended in the case—the line of the mainland coast in East Finnmark and the line of the island coast along the skjaergaard. It is this base-line at which you arrive if you apply the coastline rule without any limit on the width either of bays or of indentations within islands. If this more limited concept of the general direction of the coast had been adopted by the Court, the rule which it laid down would have been less difficult to reconcile with the customary law of inland waters as previously understood. Even this rule would still have been a piece of bold judicial legislation but, given the uncertainty in the law of bays and of islands, it could be presented as a 'rationalization' which resolved the uncertainties in favour of the coastal state. This rule, although a liberal rule, would also have been much less open to the objection of being vague and subjective, since under it the base-line would be closely tied to the physical line of the land.

The exceptional character of the Norwegian coast

Norway's second line of argument, we said, was that, even if the coastline rule were accepted as established law, it was incapable of application to

¹ Wilson, *Hague Arbitration Cases* (1915), p. 102.

² *Ibid.*, p. 127.

³ See Boggs in *A.J.I.L.* 45 (1951), pp. 256 ff.

such a complicated coast as that of Norway. The tide-mark rule would be submerged under the exceptions. The United Kingdom urged that Norway's coast is by no means unique, being matched even by the west of Scotland,¹ and that the only effect of the complexities would be to bring the exceptions to the tide-mark rule into play very frequently. This would not, however, mean that the coastline system as a whole became inapplicable. The Court, as will appear in the second passage cited below, held that the coastline rule is incapable of application to the Norwegian coasts. More important, however, is the question whether the emphasis placed by the Court on the exceptional character of Norway's coast limits the scope of the new general direction of the coast rule.

The Court not only described the Norwegian coast as 'very distinctive', but in some passages it went near to treating it as wholly exceptional:

p. 127. 'The coast of the mainland does not constitute, *as it does in practically all other countries*, a clear dividing line between land and sea.'

pp. 128-9. 'Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjaergaard" along the Western section of the coast here in question, the base line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances, the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. *Such a coast, viewed as a whole, calls for the application of a different method.* Nor can one characterise as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.'

p. 139. 'The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, *was imposed by the peculiar geography* of the Norwegian coast.'

These passages give the impression that the Court considered the Norwegian coast to be wholly exceptional *and applied an exceptional rule*. Such a view of Norway's claims has some support from Gidel² and Boggs³ who, before the 1935 lines for northern Norway had been promulgated, were disposed to allow Norway a special right to a system of straight lines in view of her exceptional coasts and her historic claims.

On the other hand, the Court undoubtedly repudiated the traditional law, substituting for it the 'general direction of the coast' as a principle which 'makes it possible to fix certain criteria *valid for any delimitation of the territorial sea*'.⁴ The Court also said, with reference to the lines along the skjaergaard (p. 131):

¹ See Judge McNair's illuminating comparison of the west coast of Scotland with the Norwegian skjaergaard in his Dissenting Opinion, pp. 169-70.

² Gidel, vol. iii, pp. 651-2.

³ *A.J.I.L.* 24 (1930), pp. 554-5; but see *ibid.* 45 (1951), p. 249, where Boggs actually uses a section of the Norwegian skjaergaard to illustrate a perfectly normal delimitation by arcs of circles.

⁴ At p. 129.

'Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system". As will be shown later, *all that the Court can see therein is the application of general international law to a specific case.*'

If the several passages cited above sometimes seem to point in opposite ways, it is clear enough that the Court put forward the 'general direction of the coast' as a general rule. At the same time, it is no less clear that the Court considered the exceptional character of Norway's coast to produce legal effects. These effects can only relate to the application of the general direction of the coast rule and the explanation must be that the enclosure of waters by drawing lines between extremities will be allowed on a more liberal scale in the case of exceptional coasts. This explanation accords with an observation made by the Court in the passage previously cited where it said that the real test of inland waters is the sufficiently close link between the sea areas and the land domain. The Court went on (p. 133):

'This idea, which is at the basis of the determination of the rules relating to bays, *should be liberally applied* in the case of a coast, the geographical configuration of which *is as unusual as that of Norway.*'

If this explanation is correct, the Court did not intend to open the door wide to extravagant claims on normal coasts. In other words, although Norway's 1935 line may be a precedent for the method of applying the general direction of the coast rule on exceptionally broken coasts, it is not a precedent for unlimited straight base-lines all around every coast. Whether the Court's language was sufficiently precise to effect this intention is a question which can only be answered by examining the position which now obtains under the general direction of the coast rule.

*The low-water mark under the general direction
of the coast rule*

The low-water mark, as has been said,¹ survives only as the legal definition of the outermost point of land where it is necessary to define it. Taking the extreme case of the Norwegian system, the low-tide mark serves simply to fix the precise position of each of the minute base-points which constitute the only visible links in Norway's base-line. At the other extreme there may be cases where the tide-mark *along the coast* is still the only practicable base-line, for instance, where a long stretch of the coast is almost straight or slightly concave. Examples of a straight coast are the Belgian coast and the coast of France in the southern half of the Bay of Biscay,² while an example of a slightly concave coast is perhaps the English

¹ See p. 137 above.

² A closing line being drawn across the Bassin d'Arcachon.

coast between Yarmouth and Sheringham.¹ In these cases the tide-mark along the coast, even under the Court's rule, is the only line which can legitimately be said to conform with the 'general direction of the coast'. It is in the intermediate—and normal—cases of coasts moderately curved and indented that the part still to be played by the low-water mark is doubtful.

The Court has not decreed that the base-line of every state shall henceforth under customary law be composed of straight lines. It has said that straight lines which follow the general direction of the coast and satisfy its criteria for the enclosure of inland waters are in accordance with international law. The Court's decision is facultative rather than mandatory in regard to the use of straight lines. The extent to which the tide-mark along the coast is ousted by straight lines will thus depend on the developments in state practice in the light of the Court's decision. Some states, including the United Kingdom,² have treaty commitments which affect their freedom of action in the use of straight lines. Moreover, the general direction of the coast rule is open to such different interpretations that the promulgation of base-lines is essential before they are enforced against foreigners. Consequently, unless and until base-lines have been promulgated the tide-mark along the coast would still seem to be the presumptive base-line subject to existing claims to bays and other inland waters.

The vital point, of course, is how far the Court has given states a general licence to depart from the tide-mark in the case of curvatures which are neither true bays nor island indentations—a point which is discussed below under 'bays' and 'curvatures'.³ The Court, as has been shown, stressed that the Norwegian system is an application of the general direction of the coast rule to an exceptional coast. In one passage the Court seems actually to regard the low-water mark as the normal base-line (p. 129):

'Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjaergaard" . . . the base line becomes independent of the low-water mark and can only be determined by means of a geometric construction. In such circumstances, the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities.'

This passage, it is believed, confirms that the low-water mark along the coast is still the presumptive base-line, however easily it may in certain conditions give place to straight base-lines under the Court's new rule.

¹ It would be difficult today to make a 'Kings Chamber' out of this part of the coast, which has changed since James I's day (see Fulton, p. 122, n. 1).

² For example, the North Sea Fisheries Convention of 1882 affecting the North Sea coasts of five countries, and the Anglo-French Convention of 1839 affecting all coasts of the two countries.

³ See below, pp. 155-7.

*Bays, curvatures, and island passages under the
'general direction of the coast' rule*

Bays. The Court, as was said,¹ appears to recognize the existence both of a legal concept of a bay and of some legal rule governing bays, though it does not recognize any general limit of width for inland bays. The question therefore is, how does the law of bays fit into the 'general direction of the coast' rule. *Prima facie*, where an indentation or deep curve of the coast qualifies in law as a bay, a line drawn from headland to headland across the actual entrance of the bay is one which follows the general direction of the coast. By definition, a bay is an indentation into the coastline so that a line from headland to headland follows not merely the general direction *but the actual line of the coast*. Consequently, the Court's rule allows all legal bays to be treated as inland waters regardless of their size. The Court, however, has greatly diminished the significance of the legal concept of bays for two reasons:

- (a) It appears specifically to approve of the ironing out of 'minor curvatures' even when there is no bay, and it did not disclose what limit, if any, is involved in the word 'minor'.²
- (b) It appears in its treatment of East Finnmark to approve the joining of lines between two jutting-out points even when the intervening sinuosities cannot be said to qualify either as a bay or as a 'minor curvature'.³

All that the Court demands is conformity with the general direction of the coast, which in East Finnmark it determined—apparently by eye—on small-scale charts. The rule applied off East Finnmark will seem, to those who are familiar with the map of the King's Chambers, not very different from the rule adopted in 1604 by James I for the definition of England's neutrality limits.⁴ The Court's rule is something like a return to the King's Chambers, which have long since been abandoned by Great Britain,⁵ or to the so-called headland theory which Umpire Bates said in 1854 had received its proper limit in the ten-mile rule for bays.⁶

It follows that any distinction between historic and ordinary bays is eliminated by the Court's formulation of the law of inland waters. If all

¹ See p. 142 above.

² See p. 141 above.

³ See the map on p. 115 above.

⁴ Fulton, p. 123. The jury of Trinity House who drew up the map described the Chambers as 'all the sea-coasts within a straight lyne drawne from one head land to the next head land throughout this realme of England' (*ibid.*, p. 754).

⁵ See Fulton, pp. 122 and 148; Sir Maurice Gwyer at the 1930 Codification Conference (*Minutes*, p. 111). Sir William Robson's *dictum* to the contrary in the *North Atlantic Fisheries Arbitration* was a misconception: see British Memorial in the *Anglo-Norwegian case*, paras. 132-7.

⁶ *The Washington*: Moore, *International Arbitrations*, vol. iv, pp. 4342-5. It is somewhat striking that Judge Basdevant, writing in 1911, strongly emphasized that the Award in the *North Atlantic Fisheries Arbitration* had not affected the authority of the decision in the case of *The Washington* (*Revue générale de droit international public*, 19 (1911), p. 565).

bays may be treated as inland waters, proof of an historic title is otiose. It is, indeed, a measure of the divergence of the law laid down by the Court from the traditional law that there is now no room left for the classical¹ distinction between historic and other bays. Whether the Court has left any role for an historic title to play in maritime law is considered below but, at any rate, it cannot, apparently, any longer concern bays *stricto sensu*.

The Court has not, however, made the size of a bay wholly irrelevant. It has rather lifted the element of size to a higher plane. The important question now is not whether the shores of a bay are more or less than ten miles apart but whether the shores are so far apart that they must be regarded as separate coasts instead of merely the separate arms of an indentation in a single coast. In other words, when is a curvature, which otherwise has the proportions of a bay, so large that it must be regarded as forming two distinct coasts and that a line across the mouth would not conform to the 'general direction of the coast' of the state concerned? For example, can the Bristol Channel be regarded as a mere indentation into a coastline running from Land's End to St. David's Head (the King's Chamber)? Or must the shores of this indentation be regarded as separate coasts at any rate until some point nearer inland? And, if so, when do the separate coasts merge into a single coast for the purpose of the Court's rule?

Curvatures. A similar question arises in regard to shallow curvatures. If minor curvatures may be smoothed out, when is a curvature a minor one? A minor curvature appears, in the first place, to denote a shallow as distinct from a deep indentation. Whether the word 'minor' also denotes a curve small in its lateral extent along the coast is not so clear. The minor curvatures dealt with by straight lines in the practice of two or three states, to which the Court seems to have referred, are subject to ten- or twelve-mile limits. On the other hand, some of the curvatures on the East Finnmark coast which are cut across by the 1935 line are longer than twelve miles. The Court would, presumably, regard a line drawn across the Bay of Biscay from the Spanish border to Cape Finisterre as abusive, but it showed a distaste for ten-mile limits and gave no guidance as to when a curvature becomes too long to be 'minor'. Take, for example, the French coast between Boulogne and Fécamps. If, as is imagined, this coast is not a 'minor curvature', how far can any part of it be treated as one?

Both in the case of bays and of curvatures, once you abandon any form of numerical or physical test, everything becomes a matter of opinion. The application of the law will vary with the size of the judge's foot—or at any rate

¹ See, for example, Judge Drago in the *North Atlantic Fisheries Arbitration*: 'it may safely be said that a certain class of bays which might properly be called the historical bays, form a class distinct and apart . . .'. See also Gidel, vol. iii, pp. 621 ff.

with the scale of his charts. Indeed, as states can but infrequently be brought to the judgment seat, the law will vary with the stretch of the diplomatist's conscience and the determination of his state to maintain its point of view. And the offended state will scarcely have the means of knowing whether its complaint is good or bad in law.¹

Island passages. Islands may be treated as part of a mainland coast if they are 'but an extension of the mainland' or 'constitute a whole with the mainland'. The test, we have previously said, seems essentially to be the geographical unity of the islands with the mainland. Here again the test, though geographical, involves a large element of subjective appreciation, as turning over the pages of an atlas will soon show. Distance from the mainland or from other islands, which in 1930 was regarded as the cardinal factor, is still presumably very important in appreciating the unity of islands with the mainland. Geological unity is also perhaps indicated by expressions in the Judgment. In the pleadings, Norway suggested that the test is whether the intervening waters operate as a unifying or separating element between the islands and the mainland.² The United Kingdom, on the other hand, suggested that the test is whether the position and configuration of the islands tend to enclose the waters and take them out of use by international navigation.³ This test would leave straits which are used by coastwise navigation territorial, not inland, waters. The difference between the two Parties is the difference between looking at the intervening waters from the point of view of the coastal state and from the international point of view. The Court's pronouncements appear to look only at the link between the sea areas and the land and not at the function performed by the water-spaces in international navigation.

One of the points made at the 1930 Conference with respect to the creation of a special régime for archipelagos was the undesirability of converting navigational channels between islands into inland waters and thereby excluding the right of innocent passage through straits. At the same time, it was appreciated that, although in one sense all inter-island channels are straits because passage can be made through them, however deviously, from one part of the sea to another, yet a distinction exists between channels which lead essentially to inland waters and channels which are a connecting-link between two parts of the open sea. Sub-committee No. II in its report accordingly provided that if a strait forms 'a passage between two parts of the high sea', the coastal state is only entitled to *territorial* waters, but added that this rule did not apply to straits giving access only to inland waters.⁴ The latter were assimilated to bays. These provisions do not

¹ Cf. Judge McNair (at p. 169) on the danger of encouraging subjective appreciation of their rights by coastal states instead of requiring them to conform to a common international standard.

² Counter-Memorial, paras. 422-5.

³ Memorial, paras. 113-21.

⁴ See pp. 144-5 above; Plenary Meetings, p. 133.

contemplate that the channels between islands of an archipelago, including coastal archipelagos, shall necessarily be treated as enclosed inland waters. Everything is to depend on whether the straits are inland passages or passages between parts of the open sea. This, of course, is close to the United Kingdom's point of view.

The United Kingdom, in the interests of freedom of navigation,¹ suggested that the so-called Indreleia route through the Norwegian 'leads' between the islands ought strictly to be treated as territorial rather than inland waters. Norway's historic claim to the leads, however, having always been framed as a claim to inland waters and Norway having given an assurance that already established rights of navigation would not be interfered with, the United Kingdom virtually surrendered the point at the oral hearing in the particular case of Norway.² The Court held that the 'Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway'.³ Geographically, there are certainly grounds for considering the narrow Indreleia channels, which penetrate deeply into Norway, to be inland passages rather than true straits.

The régime of the channels between islands is by no means a minor point in view of the wide liberty apparently allowed to a state by the Court to enclose areas of sea by lines joining coastal islands. A glance at the Greek archipelagos will show what a serious interference with the right of innocent passage might result from interpretations of the Court's 'general direction of the coast' rule which its language does not expressly exclude. It may be, however, that significance is to be attached to the Court's statement that '*for the purposes of the present case*' it was unable to treat the Indreleia channels as having a different status from the rest of the waters within the skjaergaard. The Court may have intended, by the italicized words, to reserve the question of the right of passage. In the past the principal distinction between inland and territorial waters has lain in the existence of a right of passage through the latter but not through the former. It is beyond the scope of this paper to consider what are the implications of the Court's judgment for mid-ocean archipelagos. But even in the case of coastal archipelagos, as off Greece, there is a potential clash between the Court's concept in the *Corfu Channel* judgment⁴ of international straits through which there is an absolute right of innocent passage even for warships and its concept in the present judgment of inland waters enclosed

¹ The waters involved had no importance for fishing.

² United Kingdom's opening speech.

³ At p. 132. It is not imagined that the Court meant that the provision of navigational aids by itself converts channels into inland waters because many important and comparatively wide straits have artificial navigational aids.

⁴ *I.C.J. Reports*, 1949, pp. 28-29.

by islands. It is to be hoped that the *Corfu Channel* doctrine prevails, even if this means recognizing a right of innocent passage through inland waters in certain circumstances. The point is well illustrated in the *Corfu Channel* itself. The south channel lies between the Greek island of Corfu and the mainland of Greece and is largely enclosed by the long tongue of the island running parallel to the mainland shore. Yet, under previous notions of the law of inland waters, to hold these waters to be inland waters would directly conflict with the Court's principle in the *Corfu Channel* case.

Norway's historic title

The facts on which Norway's historic title is based have been given in outline at the beginning of this article. The Court, on the evidence of the *Exposés des Motifs* accompanying the decrees of 1869 (Sunnmøre) and 1889 (Romsdal and Nordmøre), found that these local decrees constituted a reasoned application of a definite system applicable to the whole of the Norwegian coastline. It rejected the United Kingdom's thesis that the decrees were specially designed for the particular areas. The Court further held that the existence of a Norwegian system for the whole coast was confirmed by the 1912 Report and by the Supreme Court's decision in *The St. Just* in 1933. There is evidence to the contrary which is not mentioned in the Court's judgment, including the decision of the Supreme Court in *The Deutschland* only six years before *The St. Just*. A summary of the opposing evidence will be found in Judge McNair's Dissenting Opinion,¹ but it would serve no purpose to examine it here. It suffices here that the Court, by ten votes to two,² found that the Norwegian system of base-lines took shape in Norway's *municipal law* in the 1869 and 1889 Decrees. It may, however, be mentioned that, in East Finnmark where there is no *skjaergaard*, Norwegian practice before the *St. Just* case (1933) does not support a system of base-lines drawn merely from point to point along the coast.³ The legislation and the cases contemplate lines drawn from one headland to another of the individual fjords.⁴ The Court did not separately investigate the evidence relating to East Finnmark.

The point of general interest is the Court's consideration of the effect of the attitude of other states on the validity of the Norwegian system in

¹ At pp. 172-80.

² Even one of these two judges, Judge Read, was prepared to proceed on the assumption that the Norwegian system came into being in 1869, though considering the matter not to be free from doubt (p. 199).

³ The 1912 Report cautiously suggested that it would be in accordance with Norwegian tradition to draw lines from point to point, but the evidence in the Report relating to fjords, both legislation and cases, does not support this suggestion.

⁴ See pp. 123-4 above.

international law. This point was much discussed in the arguments of the Parties which, roughly speaking, ran as follows. Norway contended that the role of the historic element—that is, long usage—in an historic title is merely to consolidate and confirm a claim which intrinsically is valid without the historic element. A long usage merely confirms that the limits claimed by a coastal state correspond to its legitimate interests. Norway thus denied that the consent of other states is necessary to the establishment of a claim exceeding what is generally accepted. At the same time, she herself relied on the consensual basis of international law by invoking the principle that a state is not bound by a rule of customary law which it has persistently refused to accept. She argued that even if the coastline rule were established in customary law, it was not binding on Norway who, so she maintained, had always refused to accept it. The United Kingdom, on the other hand, maintained that the consent of other states, either express or implied, is the foundation of an historic title where the claim exceeds what is allowed under established international law.¹ The consent of states being the constitutional basis of customary law, the United Kingdom contended that, where a claim does not go beyond the customary law, *ex hypothesi* it has the consent of other states, but that where it does go beyond what is generally accepted, the consent of the states against which it is asserted has to be affirmatively shown. Historic usage is relevant simply because it proves by inference that the claim has the tacit consent of other states. The mere fact, which Norway did not dispute, that the burden of proving an historic title lies upon the claimant is irreconcilable with the historic element only operating to *confirm* the claim. At the same time, the United Kingdom conceded that if a state had once possessed established legal rights to extended maritime territory and *then declined to acquiesce in a change in international law restricting such rights it would not lose its established rights*. This would, however, only be the case if the state openly and consistently made known its dissent from the new rule at the time when the latter first came into operation. So far as concerns the present case, the United Kingdom argued that, while Norway might invoke this principle to contest the application of a ten-mile limit for bays² she could not rely on it to contest the application of the coastline rule. It maintained that the coastline rule had entered international law as part and parcel of the modern system of fixed maritime belts appurtenant to the land and that the Kingdom of Denmark-Norway was indeed the actual

¹ The evidence in favour of this view is really overwhelming (see United Kingdom's Written Reply, paragraphs 436 ff.). Both Norway herself and Denmark accepted it in the *Eastern Greenland* case (1933), *P.C.I.J.*, Series C, No. 63, p. 1305, and No. 66, p. 2873.

² Norway's claim to all bays regardless of size, as previously explained, was admitted. Norway had declined to adhere to the North Sea Fisheries Convention, 1882, partly on the ground that she could not accept a ten-mile limit for her fjords.

founder of this system.¹ Norway had unequivocally adopted the system of a fixed maritime belt *delimited from the land* by the end of the eighteenth century and, in consequence, the Norwegian system of straight base-lines, which dated at earliest from 1869, was an *innovation requiring the acquiescence of other states*.

Such, in brief, were the respective views of the Parties on the principles to be applied in considering Norway's claim to an historic title. Both views are reflected in the Court's judgment. Norway's view appears in the third of the Court's 'criteria' for deciding claims to inland waters.² The Court there referred to 'certain economic interests peculiar to a region, the *reality and importance of which are clearly evidenced by long usage*'. Again, as an alternative ground for upholding the 1935 line across the LoppHAVET, the Court relied on evidence of the survival of ancient rights, saying:

'Such rights, founded on the vital needs of the population and *attested by very ancient and peaceful usage*, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.'

The Court's finding that ancient rights possessed by Norway in the LoppHAVET survived into modern times passes over difficulties in the evidence which will be found discussed in the Dissenting Opinions of Judges Hsu Mo and Read.³ The Court itself recognized that it was not always clear to what specific areas the historical evidence related, and Judge Hsu Mo was perhaps more orthodox in insisting that precision is vital to any prescriptive claim. An equally important point is the meaning to be given to the word 'usage'. The Court referred⁴ to fishing and whaling licences granted to one Eric Lorch between 1688 and 1698 in respect of small areas of the LoppHAVET near or outside the outer limit of the 1935 line. There was no evidence of the renewal or continuance of these licences, which belonged to the period before the reduction of Norway's maritime claims to a four-mile limit.⁵ Otherwise the Court merely referred to 'historical data' in support of the 'idea of the survival of ancient rights'. The historical data related simply to fishing by Norwegians and to the regulation of the fishing of Norwegians. As the four-mile limit taken from the outermost rocks was applied in fisheries early in the nineteenth century, this evidence does not seem to carry the matter any farther. As the Court does not particularize in regard to the evidence, we cannot be sure what was the legal concept of

¹ The 1745 Rescript introducing the four-mile league seems to be the first claim to a defined belt of fixed width.

² See pp. 148-9 above.

³ In addition to the specific difficulties mentioned by these judges, Raestad in his monumental work on Norway's maritime claims (*Kongensstrømme*) concluded that the four-mile belt was applied generally in fisheries probably by 1800 and certainly by 1830.

⁴ At p. 142.

⁵ See Judge Hsu Mo, p. 157, Judge McNair, pp. 184-5.

'usage' on which it acted. Two of the dissenting judges¹ said that the activity of private fishermen in a given area could not confer sovereign rights and their opinion is certainly in accord with the generally understood principles governing the acquisition of sovereignty. The Court can hardly have intended mere private fishing by nationals to be included in its reference to 'usage',² but whether Norway's *state acts* in relation to its own nationals on the sea were classed as 'usage' is more debatable. On principle, state activity on the sea must be exclusive, i.e. asserted against foreigners as well as in respect of nationals, if it is to form the basis of exclusive sovereign rights. For every state has a right to exercise sovereignty in regard to its own vessels and nationals *on the high seas*. The question is of interest in connexion with President Truman's Fishery Proclamation of 3 September 1945, the underlying theory of which is that private fishing on the high seas by nationals and control of that fishing by the state does not create exclusive rights but does attract a right to regulate and conserve the fishery either alone or in conjunction with other states.³ On this theory 'usage' in fishing and in control of fishing creates a vested interest in the fishery—but not an exclusive right.

The United Kingdom's doctrine of the nature of historic titles appears more largely in the Court's judgment. In one passage the Court said that the *usual* meaning of historic waters is inland waters, which would not have that character but for the existence of an historic title, and then went on to describe the United Kingdom's doctrine as a kind of '*possessio longi temporis*'. Later, when it had found the existence of the Norwegian system to be established *in Norwegian law from 1869*, the Court added (p. 138):

'From the standpoint of *international law* it is *now necessary* to consider whether the application of the Norwegian system *encountered any opposition from foreign States*.'

The Court then gave considerable weight to the fact that the Norwegian system, in its view, had been long 'tolerated' by other states. Thus, from the standpoint of international law, the Court seems to have regarded the Norwegian system as having its legal basis in the consent of states.

The Court's method of handling the evidence relating to the acquiescence of other states is of general importance. It held that neither the promulgation nor the application of the 1869 and 1889 Decrees had 'given rise to the opposition of foreign States'. As there was no evidence of the application of these decrees to foreign vessels, there was equally no evidence that their application had given rise to opposition. But it is too large a statement

¹ Judges Hsu Mo and McNair.

² Cf. the *Eastern Greenland* case (1933), Series A/B, No. 53, pp. 45-46, where the Court said that there must be 'the intention and will to act as *sovereign* and some actual exercise or display of such authority'.

³ See *A.J.I.L.* 40 (1946), Supplement, p. 46.

to say that the promulgation of the 1869 Decree had given rise to no opposition since, in correspondence which was before the Court,¹ France had immediately objected to the 1869 Decree on the very grounds that the base-lines did not comply with the coastline rule or the ten-mile limit. The significance of this invocation of the coastline rule and ten-mile rule for bays thirteen years before the North Sea Fisheries Convention would appear to be considerable. The Court, however, said that France 'did not pursue the matter'. That is true, for France, *having addressed two Notes to Norway in which she maintained her objections of principle*, had more urgent things to think about in the shape of the Franco-Prussian war. Both the Norwegian jurist Raestad² and the authors of the *1912 Report*³ considered the result of these exchanges between France and Norway to be *that each state maintained its own point of view*. However, no state reacted to the later, 1889, Decree, and the United Kingdom admitted that Norway had probably acquired a right to enforce the particular base-lines of these two decrees against other states *in respect of the actual areas covered by the decrees*.

The principal argument of the United Kingdom was that, even if the 1869 and 1889 Decrees did apply a definite system in Norwegian law, it was unreasonable to fix other states with knowledge of and acquiescence in a system which only lay concealed in these two minor decrees covering small sections of the coast. The Court, on the other hand, held that since the decrees, in its view, were the application of a well-defined and uniform system, it was the system itself which would 'reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States'. Here the Court jumps a gap—the crucial point in the United Kingdom's argument—without clearly bridging it. After all, how did the Court satisfy itself that the 1869 and 1889 Decrees were not merely *ad hoc* legislation governed by particular circumstances but the application of a general system? The Court found its proof of the Norwegian system not in the decrees themselves but in the 'Exposés des Motifs' justifying the decrees and in statements of the Norwegian Government in its correspondence with the French Government.⁴ *None of these documents were generally known until extracts from them appeared in the 1912 Report*. Yet the Court said that the United Kingdom must have known of the 1869 Decree *and, knowing of it, could not have been under any misapprehension as to the significance of its terms which clearly described it as constituting the application of a system*. Neither the 1869 nor 1889 Decrees contained any word describing themselves as the application of a system.

However, on that basis the Court found that the 'general toleration' of

¹ The Court referred to this correspondence on p. 136 of its judgment.

² Raestad, *Kongensstromme*, p. 357.

³ *1912 Report*, p. 105.

⁴ See pp. 135-6 of *I.C.J. Reports*.

foreign states with regard to the Norwegian practice was an unchallenged fact and that for more than sixty years the United Kingdom did not contest it.¹ Indeed, it found that the United Kingdom did not make any formal or definite protest in regard to the system until as late as 1933. The Court, in making this finding, devoted particular attention to the North Sea Fisheries Conference of 1881-2, drawing two conclusions from the circumstances of the Conference:

1. Norway's refusal to adhere to the 1882 Convention raised the question of the delimitation of her maritime domain especially with regard to the drawing of straight lines across bays;
2. Great Britain, by reason of its great interest in the North Sea fisheries, must have been aware of, and have acquiesced in, Norway's claim.

But, as Judge McNair pointed out,² there are other and somewhat different inferences which may be drawn from the same circumstances:

1. Neither Great Britain nor the other states could possibly have been put on notice of the Norwegian system by what occurred at the Conference since the Norwegian delegate said not a word about a Norwegian system of straight base-lines. The only special Norwegian claims which he put forward were to a four-mile maritime belt and fjords wider than ten miles.
2. Similarly, Norway's subsequent abstention from the Convention could not possibly give Great Britain notice of the system since the same claims to a four-mile belt and to fjords larger than ten miles were the only reasons given for the abstention.
3. The refusal of Great Britain and others to make any exception in favour of Norway's special claims appears to be at least some indication of opposition to those claims.

In short, if Great Britain did not formulate any express or definite protest against the system of straight lines, Norway equally never formulated that system in intelligible form until at earliest the *1912 Report*. As to Great Britain not having formulated an express reservation until 1933, this seems beside the point since from 1908 onwards she was persistently protesting against arrests and pressing upon Norway much more restricted maritime limits than those allowed under the Norwegian system.

The main point, however, is that the Court, when it held that the Norwegian system had the '*general toleration of the international community*', seems to have fixed states with a more stringent duty of alertness in scrutinizing the domestic legislation of other states and in objecting to claims—or even possible claims—than is acted upon in state practice. It is interesting

¹ At p. 138.

² At pp. 178-9.

to compare the Court's interpretation of the United Kingdom's failure to react to the 1869 and 1889 Decrees with declarations by the United States and France respectively concerning the extent to which they considered themselves affected by a claim in municipal legislation. *In 1863*,¹ Secretary Seward, speaking of the Spanish claim to a six-mile maritime belt off Cuba, said:

'A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime Powers of the world. *It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation.*'

In 1951, France in a Note concerning recent Latin-American claims said:

'Le Gouvernement français n'a jamais reçu, par la voie diplomatique, notification des résolutions ou propositions adoptées, de 1945 à 1950, par le Mexique, le Chili, le Pérou, Costa-Rica et le Salvador, ayant pour effet de changer la limite de leurs eaux territoriales. Il n'a donc pas eu, dans ces cas précis, à formuler un avis.

'Aucun État ne peut, par une déclaration unilatérale, étendre sa souveraineté sur la haute mer et rendre cette annexion opposable aux pays qui ont le droit d'invoquer le principe de la liberté des mers, tant que ces derniers ne l'auront pas formellement acceptés. Une renonciation à une règle de Droit International établie dans l'intérêt de la communauté des nations ne peut pas se présumer.

'Telle pourrait être la position que le Gouvernement français soutiendrait si un quelconque pays lui notifiait officiellement sa résolution d'étendre la limite de ses eaux territoriales. Cette position n'a aucun caractère confidentiel puisqu'elle est fondée sur des principes universellement reconnus de Droit International.'

One of these statements was almost contemporaneous with the promulgation of the 1869 Decree; the other was made a few months before the Court gave judgment.

Judge Read expressed the view that 'the only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position. . . .' If this view is, perhaps, too strict and too unfavourable to the coastal state, the Court seems to go too far in the other direction when it fixes states with knowledge—and toleration—of Norway's claim to a general system of straight base-lines by what is really a principle of constructive notice. It is true that the Court spoke of the 'notoriety of the facts', but of this notoriety outside Norway there was no evidence, except in the case of France who, having had a dispute with Norway about the arrest of a French vessel the year before the 1869 Decree was issued, was

¹ Moore, *Digest* (1906), vol. i, p. 710.

more on the alert.¹ Despite the closer interest which states have come to take in each other's affairs since 1863, Secretary Seward's *dictum* that a state is not chargeable with notice of a claim expressed merely in a municipal law and not brought to its attention seems to be correct in principle and reasonable in practice. France in her recent Note concerning Latin-American claims asserts that she is not affected even by actual knowledge of a claim not derived directly from the coastal state. Under the Court's ruling it seems clear that actual knowledge is sufficient to set the prescriptive period of 'toleration' running against the state concerned. The further point made by France that a state is entitled to rely on its rights under the general law so that it is not bound to voice its objections until its interests are directly affected accords with Judge Read's Opinion. But it now seems unsafe to remain silent in the face of knowledge of a claim. The moral is that those states which are concerned to preserve the freedom of the seas should pursue a much more energetic policy in making protests or reservations against claims considered to be objectionable.

Historic waters under the 'general direction of the coast' rule

It has previously been pointed out that the 'general direction of the coast' rule appears to have wiped out the distinction between historic and ordinary bays. If this is correct, the principle of historic waters can henceforth only apply to claims to inland waters outside any lines capable of being regarded as following the general direction of the coast. In this connexion it has to be remembered that the Court under its general rule:

- (a) allowed even departures from the general direction of the coast which are not 'appreciable';² and
- (b) emphasized that the choice lies with the coastal state where more than one line can be said to represent the general direction of the coast.³

Consequently, it is only in case of a 'manifest abuse' of the 'general direction of the coast' principle that the question of an historic title to inland waters can assume importance.⁴

Conclusion

The Court thus came down on the side of Norway and against the United Kingdom on most points in the case. On the case as a whole, i.e.

¹ It is clear that, when the Norwegian jurist Aubert explained the Norwegian system to the Institute in 1894, he was enlightening his colleagues about something of which they were unaware before. The account which he then gave was, moreover, materially different from the system upheld by the Court. See *Annuaire*, XI (1889-92), pp. 136 ff.

² *I.C.J. Reports*, p. 133.

³ *Ibid.*, p. 143, where the Court left the choice of the closing line of the Vestfjord to Norway.

⁴ 'Manifest abuse' was the phrase used by the Court in discussing the Lophhavet (*ibid.*, p. 142).

including the historic claim, the majority was ten¹ votes to two and on the general international law eight votes to four. These are solid majorities which testify to the persuasiveness and force of the arguments of Norway's able Counsel. In consequence, a British writer naturally feels some delicacy in adopting a critical attitude towards parts of the judgment. There is certainly no wish to question the decision in favour of Norway, which was immediately and loyally accepted by the United Kingdom. The grounds of the criticism are rather that:

- (a) The Court has here made some very important pronouncements on general international law apparently against the weight both of state practice and juristic opinion without adequately explaining why it rejected all the former authority or how it felt able to present its own conclusions as rules of international law binding upon states.
- (b) The Court has made important findings on disputed issues of fact without so much as a passing reference to what sometimes appear to be obstinate facts in the opposing case.

The difficulty of arriving at a coherent presentation of the combined reasoning of eight or ten international judges is not underestimated nor is it overlooked that somewhat different techniques of judicial pronouncement are employed by courts outside Anglo-American legal systems. Even so, economy in legal reasoning and in analysis of fact seems to have been carried farther in this judgment than in many others.² In consequence, there is a risk that some of the rulings may not carry the absolute conviction which attaches to logical demonstration but does not attach to *ex cathedra* pronouncement. It is specially important that the International Court, whose jurisdiction depends on the consent of the litigants and whose exercise of its jurisdiction is so jealously watched by the whole world, should adequately expose the reasoning by which it supports its own conclusions and rejects the opposing arguments.

It is particularly to be regretted that the Court should have been so economical in its explanations in a judgment which, as the Attorney-General said in opening, 'will be of the very greatest importance in the world generally as a precedent'. The principal differences between the Parties were mostly differences of pure law, and a wealth of state practice and legal authority was presented to the Court in the pleadings and in the speeches. The law for which the United Kingdom contended is the law generally found in state practice, the law supported by the majority at the

¹ Judge Hsu Mo, however, considered the application of the Norwegian system, which he accepted as historically established, to be open to objection in the Svaerholthavet and LoppHAVet.

² The judgment is about half the length of the judgment in the *Eastern Greenland* case—a case of comparable but not larger bulk. It is materially shorter even than the judgments in *The Lotus* and *Corfu Channel* cases.

1930 Codification Conference, and the law taught in the writings of the leading jurists. The striking feature of the judgment is that the Court sweeps away existing conceptions of inland waters without even noticing the existence of a formidable body of authority diametrically opposed to some of its pronouncements. Admittedly, the Court has a wide liberty to appreciate evidence of customary law and has never been generous in its reference to authority. But, when it is overturning traditional conceptions and that in a field of law which is essentially built on the customary practice of states, more thorough explanations seem to be called for than are expressed in the judgment. The greater attention to practice and authority in the Dissenting Opinions of Judges McNair and Read is very marked.

The Court appears not merely to have based its formulation of the law of inland waters on the practice of a minority but to have adopted a formulation of the law which was actually rejected by majority opinion in 1930. The 'general direction of the coast' rule and the Court's 'criteria' for applying it has a great deal in common with a formula for base-lines proposed jointly by Norway and Sweden in 1930 as a substitute for the coastline system:¹

'The breadth of territorial waters shall be measured from straight lines drawn along the coast from one landmark to another. Any part of the territory may be used as a landmark, including islands, islets and rocks left exposed at the ordinary level of the lowest tides. As regards bays and coastal archipelagos in particular, these straight lines shall be drawn across the opening either of bays or of intervals of sea from the outward side of the archipelago. Each State shall fix the said base-lines for its coasts. It may not, however, make these base-lines longer than is justified by the rules generally admitted either as being an international usage in a given region or as principles consecrated by the practice of the State concerned and corresponding to the needs of that State or the interested population and to the special configuration of the coasts or the bed of the sea covered by the coastal waters.'

It is true that this formula does not expressly include the Court's geographical limitation—the general direction of the coast—but the substance of the formula is closely akin to that of the Court's doctrine. Sub-committee No. II, according to Gidel² who was a member of the Sub-committee, simply declined to look at this proposal, and the Sub-committee in its Report certainly adopted principles which are entirely inconsistent with the Norwegian-Swedish formula. Gidel himself strongly criticized the Norwegian-Swedish formula, saying that it was completely unsuitable for adoption as a general rule of international law.³ It therefore seems fair to say that the Court's formulation of the general rule for base-lines has been

¹ *Minutes of the Second Committee*, p. 191.

² Gidel, vol. iii, p. 509.

³ *Ibid.*, pp. 651-2; also p. 640. The 'headland theory' was also condemned by Fauchille, *op. cit.*, vol. i, Part II, p. 198.

made in face of unmistakable evidence of opposition to it by states in 1930. This fact raises the constitutional question of the role played by the consent of states in the creation of customary law and emphasizes the need in the judgment for fuller explanations of the basis on which the Court proceeded in holding its rule to be binding upon states generally and, in particular, upon the United Kingdom.

The judgment has been described by Professor Lauterpacht¹ as a 'daring piece of judicial legislation' and it is difficult to regard the pronouncements on the general law of coastal waters in any other light. Indeed, since the Court held that Norway possesses an historic title to her system of base-lines and that in any event an exceptional rule must be applied to such a very broken coast, it really had no need to venture on the general law at all. Few will wish to criticize the Court for taking one of the limited opportunities that occur of developing international law. But some onus lies on a Court which embarks on 'daring' judicial legislation to show that it is both necessary and an improvement on the former law. The chief case for departing from the principles put forward by the majority in 1930 as the law of inland waters is the uncertain practice in regard to bays and islands. This case, if admitted, still leaves it unclear why the firmly established coast-line rule should be jettisoned where there are no bays or islands or why, in settling the law of bays and islands, the practice of the minority should be preferred to that of the majority. Then, even if it be allowed that, despite the fact that customary law is grounded in the general practice of states, a sounder minority practice may be preferred to a majority practice, the question at once poses itself, is the Court's law so much sounder than the law favoured by Sub-committee No. II?

Professor Hudson² has welcomed the judgment as removing confusions which existed in the former law, but there is some danger that confusion may have been made worse confounded. First, it is permissible to question the legal utility of a geographical rule of which Judge Klaestad, when sitting in the Norwegian Supreme Court,³ frankly said that, 'because of its vagueness, it is of no great use in giving satisfactory guidance in connexion with concrete decisions'. The Court, as already mentioned, has even increased the vagueness of the rule by inviting the use of small-scale charts. Secondly, it is permissible to share the doubts of Judge McNair concerning the legal value of the Court's detailed 'criteria'. These criteria, which are for the most part subjective, constitute only the vaguest kind of legal yardstick for measuring the validity of claims. This being so, Gidel's comment⁴ on the Norwegian-Swedish formula at the 1930 Conference seems

¹ *The Times* newspaper, 8 January 1952, p. 7.

² *A.J.I.L.* 46 (1952), p. 30.

³ *The St. Just*: see p. 124 above.

⁴ Gidel, vol. iii, p. 640.

to be equally appropriate to the Court's formulation of the law of inland waters:

'S'il n'était contenu par la loyauté et la modération des États appelés à l'appliquer, un tel texte en effet serait la négation de tout état de droit. Car il pose en principe que chaque État riverain fixe pour ses côtes les lignes de base ainsi qu'il veut.'

The superiority of a system so largely subjective and so dependent on *loyauté et modération* over the essentially objective, geographical system of Sub-committee No. II hardly seems obvious in a world of sovereign states less than half of which have subjected themselves to the risk of having their *loyauté et modération* investigated by the International Court.

It is also not unimportant that a system of straight base-lines, which has a meretricious simplicity to the eye, is a less practical system than the system of the tide-mark, ten-mile bays, and 'arcs of circles'. Long straight base-lines increase the difficulty of mariners in determining whether they are within territorial waters, and the system of the general direction of the coast cannot be applied at all without a delimitation of straight lines by every state that applies it. The tide-mark, on the other hand, is shown on every reputable maritime chart.¹

The Court, as has been pointed out,² emphasized that the delimitation of sea areas cannot be dependent merely on the will of the coastal state and that its validity is dependent on international law. Nevertheless, by erecting subjective factors into primary tests of claims to inland waters, the Court has materially strengthened the 'will' of the coastal state as an element in the law and correspondingly weakened the 'will' of other states as a check upon its claims. Formerly, the primary test of any maritime claim has been its acceptance—express or tacit—by other states and the need for a claim to meet with acceptance has been the decisive check on encroachments upon the high seas. State practice in the field of customary law has a legislative quality and unilateral claims may make law, *but only when viewed in conjunction with the reaction of other states to the claim*. As Sørensen has said:³

'Ce qui caractérise cependant cette catégorie des règles, c'est que l'acte positif d'un État et l'abstention ou la tolérance de l'autre se complètent, de sorte qu'il est sans importance pour l'établissement de la coutume de les considérer séparément.'

The principle that a unilateral claim going beyond generally accepted practice does not make law for other states without their concurrence is a fundamental constitutional principle without which any formulation of maritime law is meaningless. Without this principle the freedom of the seas would be at the mercy of national ambition or exclusiveness.

¹ See Boggs in *A.J.I.L.* 24 (1930), at p. 544.

² See p. 131 above.

³ *Les Sources du droit international* (1946), p. 101.

The judgment in the *Anglo-Norwegian Fisheries* case permits a considerable expansion of inland waters under the 'general direction of the coast' rule. And every expansion of inland waters has the necessary consequence of pushing the limit of territorial waters farther out into areas hitherto regarded as high seas. In some cases the consequence may be to oust foreign fishermen from waters in which they have fished regularly for centuries, and in other cases, as previously mentioned,¹ to jeopardize existing rights of innocent passage through island channels. The question naturally arises, have not members of the international community a prescriptive right to the established boundaries of the high seas? During the past two years Sweden, Denmark, Belgium, Holland, and France, in Notes referred to in this article, have each vigorously reasserted the principle that extensions of established limits require the concurrence of other states. It is not thought that the Court intended to depart from this principle, although it inclined to the side of the coastal state in its rulings on inland waters. Ultimately, the Court placed an absolute geographical limit—the general direction of the coast—on unilateral claims and it presented this limit not as a new principle but as the principle already implicit in state practice. Whatever view be taken of the correctness of this appreciation, the Court based its formulation of the law on what it held to be a principle generally accepted in state practice.² Therefore, future claims to inland waters within the 'general direction of the coast' principle are, presumably, not to be regarded as *unilateral* extensions of coastal waters impinging on the prescriptive rights of other states on the high seas, but rather as claims having the prior agreement of other states. Certainly, when some reversal of the movement from *mare clausum* to *mare liberum* is already evident,³ it is particularly necessary that the consensual basis of maritime rights should not be unduly weakened. Otherwise there can be little prospect of an orderly development of the law, which, instead, will become a disorderly riot of unilateral claims.

¹ See pp. 157–9 above.

² The Court could scarcely put it on any other basis, having regard to Article 38 of its Statute and to former pronouncements of the Court itself—e.g. *The Lotus* case (1927), *P.C.I.J.*, Series A, No. 10, p. 18, and the *Colombia-Peru Asylum* case: *I.C.J. Reports*, 1950, p. 276.

³ E.g. some recent claims to larger maritime belts. See also the post-war claims to the continental shelf, although here the insistence of some states and of the International Law Commission on the freedom of the seas above the continental shelf is really a reaffirmation of *mare liberum*.

EXTRADITION AND EXTERRITORIAL ASYLUM

Based on the Opinions of the Law Officers of the Crown¹

By SIR ARNOLD McNAIR, Q.C.

EXTRADITION is the term usually employed to describe the surrender of alleged criminals.² By virtue of the sovereignty enjoyed by states such a person, when he remains within,³ or removes himself to, the territory of another state, is protected by international law from seizure by the agents of the state on whose territory the crime was committed. Customary international law imposes no obligation upon a state to surrender alleged criminals to other states and thus permits a state to protect them at its discretion.

The term 'asylum', or, more correctly, 'extritorial asylum', is usually employed to describe those cases in which a state declines to surrender a person demanded who is not upon its own physical territory but is upon one of its public ships lying in foreign territorial or national waters or upon its diplomatic (or, rarely, consular) premises within foreign territory.

Extradition will be treated as follows:

1. Introductory note.
2. The position in the absence of treaty obligations.
3. Treaty obligations.
4. Treaty with federal state.
5. Who may be extradited, and where they may be arrested.
6. Position of a 'third state'.
7. Demand for surrender based on condemnation *par contumace*.
8. Trial for offence other than that forming basis of the extradition.
9. Miscellaneous.

Exterritorial Asylum will be treated as follows:

1. Meaning of expression 'right of asylum'.
2. Asylum on foreign public ships.
3. Asylum on foreign diplomatic and consular premises.

¹ The Reports of the Law Officers and extracts therefrom which follow form part of a forthcoming volume described in an article entitled 'Aspects of Sovereignty' in this *Year Book*, 26 (1949). I have not given particulars of the careers of the Law Officers of the Crown whose Opinions are reproduced or referred to, because, for the most part, they can be identified in the *Dictionary of National Biography*.

² And escaped convicts.

³ It is necessary to include the specific alternative 'remains within', because it is possible to commit certain crimes in State A, while remaining on the territory of State B: see *Reg. v. Nillins*, (1884) 53 *Law Journal Reports*, Magistrates Cases, 157.

*Extradition*1. *Introductory note*

The systematic surrender of persons alleged to be criminals in pursuance of treaties is a comparatively recent practice, though formerly treaties sometimes stipulated for the surrender of persons accused of political crimes.¹ The British opinion is, and has been for a long time past, that in the absence of a treaty the surrender of an alleged criminal cannot, as a matter of international law, be demanded.² So far as Great Britain is concerned, the key to the practice lies in the ancient writ of habeas corpus and no foreign lawyer or government official can understand our behaviour when faced with a request for extradition unless he realizes the sanctity with which that prerogative writ is invested. It so happened that the practice of entering into treaties for the mutual extradition of alleged criminals developed during a period of intense political individualism in Great Britain, and since the writ of habeas corpus rendered legislation necessary the House of Commons—at that time the vigilant guardian of the political rights of individuals, though often curiously callous on the subject of the economic and social condition of human beings in the mass—insisted on certain stringent safeguards. Before a British government can surrender to a foreign government a person in this country alleged to be a criminal the former government must satisfy the courts that the proposed extradition is covered and justified by (i) a treaty or ‘arrangement’ with a foreign state, (ii) an Order in Council applying the Extradition Acts to that foreign state, and (iii) the Extradition Acts, 1870³ to 1906; that there is a *prima facie* case against him; and that the crime charged against him is not ‘an offence of a political character’. It is in the last resort by means of the writ of habeas corpus that these tests are applied.

The governments of many other countries were not hampered by safeguards of this nature and felt more free to oblige one another by surrendering alleged criminals, whether political or not.⁴

A large number of the Reports upon questions of extradition deal with the construction of the British Extradition Acts and other domestic aspects. We shall select from those having a more international bearing.

¹ See Oppenheim, *International Law*, vol. i, § 333, for the literature; *Report of the Royal Commission on Extradition*, C. 2039 of 1878; Holdsworth, *History of English Law*, vol. v, pp. 49, 50; Forsyth, *Cases and Opinions on Constitutional Law* (1869), pp. 341–74; Edward Clarke, *Law of Extradition* (4th ed., 1903), a valuable book by one of the greatest advocates of his generation, and containing much interesting history; Hailsham, *Laws of England*, vol. xiv, ‘Extradition and Fugitive Offenders’, by Percival Clarke, son of Sir Edward Clarke.

² See statement by Earl Russell in 1862, quoted by Morgenstern in this *Year Book*, 26 (1949), p. 328.

³ The principles of the Act of 1870, which is in substance a code on this subject, are summarized by Clarke, *op. cit.*, pp. 163–5.

⁴ In a Report of 7 January 1822 (F.O. 83. 2266: France) Robinson advised the British Government to apply to the French Government for the surrender of an alleged criminal who had fled from England to France, although there was no treaty.

2. *The position in the absence of treaty obligations*

For some time the law was doubtful, but later it became recognized that the Crown could not surrender an alleged criminal, even if it wished to do so, unless the surrender was authorized by legislation. We shall begin with a selection of Reports and extracts mostly coming from the period before our first Extradition Act, that is, 1843. If we exclude the very much limited provisions of Article 27 of the Jay Treaty of 1794, our two first extradition treaties of a general character were those made with the United States of America in 1842 (the Ashburton Treaty) and with France in 1843.¹

Fulton, *The Sovereignty of the Sea* (1911), refers² to a Report made in 1617 or 1618 by three lawyers upon the right of James I to demand from the states of the United Provinces the surrender of a Dutch captain who had arrested, in what appears to have been regarded as Scottish waters, one Brown, a messenger acting on behalf of James I, and carried him off to Holland. A footnote on page 174 gives the substance of the Report:

Brit. Mus. Lansdowne MSS. 142, fol. 398, 400.

'The State of the Case between his Majesty and the States of the United Provinces, touching the remanding to His Majesty of a Delinquent,' 19th November 1617. In Caesar's handwriting. It describes the circumstances of Brown's capture. The counsel whose opinion was obtained were 'W. Bryrde [? Sir Wm. Bird, Dean of the Arches], H. Marten, and Hy. Styward.'

'Brown, his Majesty's subject of the Kingdom of Scotland, was by authority from that State sent in a pinnace of the King to the subjects of the United Provinces, who were then fishing for herrings upon the coasts of Scotland, to demand a certain acknowledgement claimed by his Majesty, as due unto him in the right of that crown; that 'while delivering his errand he was arrested and carried prisoner to Holland by the Dutch commander, who pretended he had warrant and commission from the Lords the States so to do; that his Majesty (having represented this indignity by his ambassador there to the Lords the States, the latter disavowed the act of the captain) requireth the offender there, to be remanded unto himself here to receive as to justice shall appertain.

The Question—Whether this offender ought to be sent herein to his Majesty as is required.

Answer—"There are good authorities that if a subject of one State commit a heinous crime within the territory of another State (though against a private person), the subject so offending ought to be remitted to the place where the crime was committed, if it be required.' There were also opinions to the contrary, but 'two very particular circumstances about this offence seem necessarily to enforce the remission of the Dutch captain to his Majesty (1) taken from the person of Brown, who was a public messenger sent by the State of Scotland on the affairs of the Prince, and ought to have been inviolable by the Laws of Nations, and therefore a wrong and abuse done to him was *contra jus gentium*; (2) taken from the manner of the wrong done, which was *nomine publico*—viz. by a pretended commission from the Lords the States'.

¹ See Clarke, op. cit., ch. v, 'History of the Law in Great Britain'. The extradition article (no. 10) of the Ashburton Treaty of 9 August 1842 will be found in Clarke, op. cit., p. cccclxxi. A note upon it will be found in Hunter Miller, *Treaties, &c., of the United States of America*, vol. iv (1934), pp. 442, 443; though not limited territorially, it was particularly rendered necessary for dealing with fugitives from justice crossing the American-Canadian frontier. ² At pp. 171-5.

Sir Charles Hedges, who became Judge of the Admiralty Court in 1689, advised Viscount Bolingbroke that a prince by reason of his sovereignty is under no legal obligation, apart from treaty, to surrender to another prince a criminal who has fled to the territory of the former.

February 8, 1712.¹

My Lord,

Your Lordship having been pleased to require my opinion whether the demand of a criminal person fled to a foreign country is just and authorized of which you received notice this morning from Mr. Tilson. You humbly conceive that a demand in that case is not authorised by the Laws of Nations, so as to oblige any sovereign power to comply therewith; for every State having the sole power of the execution of laws within its own dominion looks on it as a diminution of sovereign authority to seize any person fled from justice upon the demand of a foreign prince, within whose territory the crime was committed, tho' for a fact committed there, it would proceed according to the laws of the place, for fugitives are accounted free till they transgress the Laws of the country to which they are fled; and princes and States think it their interest to defend the immunities and libertyes of their own dominions; and therefore I take it, that when one sovereign writes to another on this subject, the method is by way of request in behalf of justice, and on promise of doing the like when required, tho' in this (?) case I believe no prince thinks himself bound to comply therewith, and when any thing of this kind has been defined it has been evaded or, if effected, not complied with as a matter of right. And thereupon it has been often though fit to be settled by Treaty that the fugitive subjects of one State should be sent home by the other.

I am with the greatest respect, &c.,

C. HEDGES

Lord Bolingbroke.

Clarke² quotes the following 'opinion³ given to the Government in 1792, by Serjeant Hill,⁴ upon the question of the king's prerogative to expel aliens from the kingdom':

As to subjects of states in amity, I think the king hath no power over any, if they do not offend his laws, but such as are charged by the states whose subjects they are with high treason, murder, or defrauding their state, or other atrocious crimes. And as to them, if the sovereign of such state applies to have them delivered up, I think his majesty is, by the constitution, invested with the power of granting or refusing the application, and if granted, may issue a proclamation either to quit his dominions, or else may order them to be apprehended, and sent in safe custody and delivered to such persons as the sovereign of the state to which they belong shall appoint; and if any of them should procure a writ of habeas corpus, the special matter might be returned, and they would not be entitled to be discharged, for this is warranted by the practice of nations, and is therefore not part of the legislative, but of the executive power, which is vested solely in the king, who, as observed by a late learned judge (1 Bl. Comm. 253), with regard to foreign concerns, is representative of his people, and what is done by the royal authority with regard to foreign powers (he adds) is the act of the whole nation; and the prerogative in this respect has always been taken to be so clear that no foreigner ever contested it in the English courts of justice, and the habeas corpus appears to have

¹ State Papers, 42. 138. The text is a little obscure.

² Op. cit., p. 25.

³ This view of the scope and efficacy of the writ of habeas corpus, even if correct at the time, is no longer warranted by law: see Clarke, op. cit., p. 26, and some of the Reports which follow.

⁴ No doubt the man described in Woolrych, *Lives of Eminent Serjeants-at-Law*, pp. 634-59.

been designedly so penned as not to interfere with it; for the prohibition in that Act (secs. 9 and 12) against removing persons from one prison to another, or sending them abroad, is confined to subjects of this realm, whereas all the other provisions of the Act extend to all persons and all prisoners, without once mentioning the subjects of the realm, and therefore all the others are intended to extend to aliens, and this not so.

Three more opinions follow.

Home Office, Oct. 4, 1815.¹

The opinion of the Attorney and Solicitor General is requested as to the answer to be returned by His Excellency Sir Charles Stuart to the French Government upon this subject.

We are of opinion that as the Law now stands His Majesty's Secretary of State or any other Magistrate would not be justified in causing the apprehension or detention of any Person found here upon the application of any Foreign Power, nor upon such application causing any person to be carried out of this Kingdom to be delivered over to any Foreign Power, in order to his being proceeded against in a Foreign Country for any crime alledged to have been there committed. If with a view to a more satisfactory administration of Criminal Justice and to prevent the escape of guilty persons from the punishments due to their Crimes arrangements should be thought necessary between this Country and foreign States in amity with this Country that persons accused of Crimes in the one and escaping into the other shall be reciprocally delivered up on the requisition of the Government² in which the alledged offence shall have been committed, it would be necessary we apprehend to pass an act of Parliament to authorize such measures on the part of His Majesty's Government and to indemnify Magistrates and others for acts done in furtherance of such objects.

W. GARROW.
S. SHEPPARD.

Lincoln's Inn, 30 Sept. 1815.

Doctors Commons.
January 29th 1820.³

My Lord,

I am honoured with Your Lordship's Commands signified in Mr. Planta's letter of the 11th instant transmitting the translation of a Note from the Spanish Ambassador requesting that Don Antonio Balarino a Merchant of Cadiz, who stands accused of forgery, and has absconded, may be apprehended, should he be found in this country, and delivered up to the judge of the cause at Cadiz:—

And Your Lordship is pleased to request that I would take the same into consideration, and report to Your Lordship my Opinion thereupon.

In obedience to Your Lordships directions I have the honour to report that it has not been the practice of this Government in modern times to exercise a power of this kind except in cases being under the provisions of some Treaty, and under special authority given by Act of Parliament for carrying such Treaty into effect. I am humbly of opinion that this is a correct limitation of the principle with reference to the Constitutional Law of this Country, and that it will not therefore be in Your Lordship's power to comply with the request of the Spanish Government in this instance.

I have the Honour to be &c.,
CHRIST. ROBINSON

The Rt. Hon. the Viscount Castlereagh,

¹ F.O. 83. 2264: France; and see in F.O. 83. 2364: Spain, a Report of 25 August 1814.

² The words 'of the country' have probably been omitted.

³ F.O. 83. 2365: Spain.

Extract from a Report by Jenner dated 19 December 1828¹

The principle upon which this Country has acted in respect to the arrest and surrender of delinquents to Foreign Governments, has been with very few exceptions confined to cases specified by Treaties which depend for their execution in this Country on the provisions of Acts of Parliament for carrying such Treaties into effect. No such Treaty exists between this Country and Prussia and your Lordship, therefore could only request the assistance of the Prussian Authorities in this respect as a matter of favor, and not of right; and as your Lordship could not grant reciprocal facilities for the arrest of Prussian Subjects in this Country I am also humbly of opinion that it will not be advisable to comply with this part of Mr. Banks's application, and that upon the whole your Lordship cannot with propriety interfere in this case, which must be left to the decision of the Courts of Justice in Prussia before which it is now pending.

But the law of nations does not prohibit a state from surrendering a person accused of crime to another state. On 17 February 1836² Dodson reported that

the act of delivering up such offenders to be tried by the tribunals of their own country is not contrary to the Law of Nations, when the Executive Government of the State in which they have taken refuge is constitutionally invested with that power.

It is a striking illustration of the sanctity of the rule of law in England that in 1836 we were compelled to run the risk of allowing a number of Spanish convicts to roam at large over a British colony and were unable to round them up so long as they committed no offence against the local law. Any one of them could have obtained his release by means of a writ of habeas corpus if arrested with a view to being surrendered to the Spanish Government.

Joint Opinion of the Attorney- and Solicitor-General, Sir John Campbell and Sir R. M. Rolfe, as to the Detention and Extradition of Spanish Convicts wrecked on the Bahama Islands while proceeding under sentence of transportation from the Havannah to Cadiz.³

Temple, September 15, 1836.

My Lord,—We have to acknowledge the receipt of your Lordship's letter of the 31st ultimo, enclosing copies of despatches from the Governor of the Bahamas, and of enclosures therein contained, relating to certain Spanish convicts wrecked on the Bahama Islands while proceeding under sentence of transportation from the Havannah to Cadiz, in which letter your Lordship requests that we would report our opinion how far the proceedings of the Lieutenant-Governor were consistent with the law of nations and with the municipal law of England.

We beg leave to state to your Lordship that the Lieutenant-Governor has no right by the law of England to detain in custody any persons merely on the ground of their having been guilty of offences against the laws of Spain. The convicts in question, having been wrecked on an island forming part of the territories of his Majesty, are

¹ F.O. 83. 2329: Prussia.

² F.O. 83. 2244: Chile. On 7 January 1822 (F.O. 83. 2266: France) Robinson advised the Crown to apply for the surrender of an alleged criminal who had escaped from England to France, though there was no treaty between them requiring it.

³ Printed in Forsyth, *op. cit.*, p. 341, the first of a series of Reports on Extradition, followed by a useful historical note; see also Clarke, *op. cit.*, p. 126.

entitled to be dealt with as free agents so long as they conduct themselves in conformity to the laws in force in the Bahama Islands. However reasonable the course recommended by the Attorney-General of the island might be—namely, to deliver up to the Spanish authorities such of the convicts as had been convicted of the graver offences constituting *mala in se*, and to set at liberty those convicted of what were only *mala prohibita*—we are not aware of any law warranting such a course, or justifying a British Governor in treating as criminals persons who have not violated the laws of the colony over which he presides.

J. CAMPBELL.

R. M. ROLFE.

The Lord Glenelg, etc., etc., etc.,

The following Report¹ illustrates the main cause of the extradition article (No. X), of the Ashburton Treaty between Great Britain and the United States of America of 1842, namely, the ease with which criminals from the United States or from Canada could cross the common frontier and obtain safety.

Doctors' Commons,
December 30th 1839.

My Lord,

I am honoured with your Lordship's Commands signified in Mr. Backhouse's letter of the 9th of October last, stating that he was directed to transmit to me the accompanying letter from the Colonial Department enclosing a copy of a despatch from Sir George Arthur, respecting the refusal of the Authorities of the United States to deliver up to Justice a Person of the name of Lett, charged with the murder of Mr. Usher, and requesting that I would take these Papers into consideration, and report to your Lordship my opinion thereupon.

In obedience to your Lordship's commands I have taken the papers into consideration and have the honour to report that, as there is no Treaty now subsisting between Great Britain and the United States of America, for the delivery up of persons charged with the commission of crimes in Canada, and afterwards found within the State of New York, I am of opinion that this country has not, by the Law of Nations or otherwise, a right to insist upon the delivery up of Mr. Lett.

Whether by the Law or Constitution of New York, the Governor of that State is authorized with or without the sanction of the President of the United States to deliver up Persons charged with offences in Canada, I cannot undertake to say.

I have the honour to be &c.,

J. DODSON

To the Rt. Hon. the Viscount Palmerston.

The appropriate procedure for giving effect to the Ashburton Treaty was being worked out.

Temple,
August 21st 1844.

My Lord,

I am honoured with your Lordship's commands signified in Mr. Addington's letter of the 20th inst stating that he was directed to transmit to me the enclosed note from Mr. Everett, Minister of the United States of America at this Court applying under the 10th article of the Treaty of Washington² for the surrender to the American consul or

¹ F.O. 83. 2207: U.S.A.

² The Ashburton Treaty, see above, p. 174.

Vice Consul at Liverpool of John Kent who stands charged with the murder on the High Seas of E. L. Halsey, Master of the ship '*Thomas Bennett*' in order that he may be sent to the United States for trial. Mr. Addington also enclosed a copy of the above mentioned treaty, and of the Act for giving effect thereto.

Your Lordship was pleased to request that I would take these papers into my immediate consideration and report to your Lordship at the earliest practicable moment my opinion whether the individual in question could properly be delivered up under the provision of the 10th article of that Treaty, and if so, whether the enclosed form of warrant was a proper one for that purpose.

I beg to report to your Lordship that I have fully considered this case and am of opinion that the question whether the individual can properly be delivered up under the provision of the 10th article of the Treaty must depend upon whether the evidence before the Magistrate would justify his apprehension and committal for trial if the crime of which he is accused had been committed in this country and that for the purpose of this preliminary enquiry a Warrant in the proposed form will be proper to be issued.

I have the honour to be &c.,
FRED THESIGER

In this Report¹ we find Mr. James Stephen,² as he then was, Colonial Under-Secretary, one of our most distinguished administrators and ardent in using every opportunity of suppressing slavery, inquiring of the Law Officers whether the surrender of allegedly criminal slaves could be refused if the effect of their surrender would be a continuance of their slavery even if acquitted; but that point was irrelevant.³

Doctor's Commons.
October 27, 1846.

My Lord,

We are honored with Your Lordships Commands signified in Mr. Stephen's Letter of the 10th Instant, stating that he was directed to transmit to us the copy of a despatch from the Acting Governor in Chief of the Leeward Islands, with its enclosures, from the President Administering the Government of the Virgin Islands, relating to an application which has been made to the latter by the Lieutenant Governor of the Danish Island of Saint Thomas, for the arrest and restitution of two slaves charged with Burglary and Felony, who had fled to Tortola.⁴

Mr. Stephen is pleased to request that we would report for Your Lordships information, our opinion, whether, according to the Law of Nations, and the Laws of this Country, the Danish Government is entitled to demand the restitution of these Refugees, and whether it is competent to Her Majesty's Government to order the restitution of them, regard being had to the circumstances that, if so restored, they would in the event of their acquittal, be held in Slavery, and Mr. Stephen is pleased further to request that we would give such advice as may appear to us to be necessary for the guidance of Your Lordships proceedings in this case.

¹ F.O. 83. 2259: Denmark.

² Known as 'Over-secretary Stephen', who was father of Leslie Stephen.

³ The same point arose in the case of the slave Anderson: see Clarke, *op. cit.*, p. 101.

⁴ In the Virgin Islands, then and now British. In 1846 some of the Virgin Islands were British and some Danish.

In obedience to Your Lordships commands we have taken the papers into consideration and have the honor to report, that we are of opinion that according to the Law of Nations and the Laws of this Country, the Danish Government is not entitled to demand these Refugees; and it makes no difference in our view of the case, that they are Slaves by the Law of Denmark, or that in the event of their being acquitted of the Felony they would continue to be held in Slavery in that Country.

Text writers on the Law of Nations, and some Foreign Tribunals have differed on what is the positive duty of a Government as to giving up Fugitive Felons to the Government of the Country in which the Felony was committed, and there are to be found in our Law, conflicting authorities on this point, but we are of opinion that, in the present state of our Law a Fugitive Felon would be discharged on Habeas Corpus, if he were apprehended in this Country as a Refugee who had committed Felony in a Foreign Country.

We observe in the Danish Governor's letter of the 20th June 1846 reliance is placed on the 'Convention of the Sovereigns of the respective Countries', moreover, we have not found any convention whereby Refugee Felons are to be restored.

We have the honour to be, etc.

J. DODSON

JOHN JERVIS

DAVID DUNDAS

The Rt. Hon. the Earl Grey.

So great was their reverence for, or their fear of, the writ of habeas corpus that in a case where a foreign Government was willing to surrender a British subject accused of crime the Law Officers would not, in the absence of a treaty, allow the British Government to receive him, though they saw no objection in allowing an English policeman—apparently on his own responsibility and at his own risk—to bring the accused back to this country.

Doctor's Commons.

May 2nd, 1854.¹

My Lord,

We were honored with Your Lordship's commands contained in Lord Wodehouse's letter of the 26th ultimo in which he stated that he was directed to transmit to us a correspondence which had passed between the Foreign Office and the Agents of the Manchester Sheffield and Lincolnshire Railway Company on the subject of a person named John Wickey Stable, formerly in the employment of that Company, who, after defrauding the Company of a large sum of money, fled to the Continent.

His Lordship then stated that we would observe on a perusal of the correspondence that Her Majesty's Government instructed Her Majesty's Representatives at Paris and Brussels to afford all the assistance in their power to the Police Officer despatched by the Company in pursuit of John Wickey Stable and that the individual in question had been arrested by the Prussian Authorities at Bonn on the charge of having travelled under a false name.

His Lordship further stated that we would also observe that the Prussian Authorities had found on John Wickey Stable several documents relating to the Affairs of the Manchester Sheffield and Lincolnshire Railway Company which are now in the hands

¹ F.O. 83. 2329: Prussia.

of the Commissary at Bonn, and that the Prussian Authorities appeared to be willing to deliver up the Individual to the Police Officer sent to arrest him.

His Lordship concluded by stating that he was to request that we would take the correspondence into our consideration, and that we would report at our earliest convenience whether in our opinion, in the absence of an Extradition Treaty between the two Countries, Her Majesty's Government would be justified in requesting the Government of Prussia to deliver this person and the documents found in his possession into the custody of an English Police Officer, and whether he could be legally detained by such Officer and brought to this Country.

In obedience to Your Lordship's commands we have considered the correspondence transmitted to us and have the honor to *report That* there being no extradition treaty between this Country and Prussia, we are of opinion that Her Majesty's Government should not interfere in this case.

If indeed the Prussian Government should think proper to deliver up Stable to the Police Officer sent after him, and the Officer should bring him to this Country and hand him over to the authorities to be dealt with according to law, we are warranted by precedent in saying that a Court here would not interfere to discharge Stable, but would allow the law to take its course leaving him to adopt any legal remedy he might have against the Officer; but the proceedings on the part of the latter could not be justified in point of law, and we think therefore, that Her Majesty's Government ought not to be a party to it.

We have the honor to be &c.,
J. D. HARDING
A. E. COCKBURN
RICHARD BETHELL

The Rt. Hon. the Earl of Clarendon.

A state whose constitutional law empowers it to surrender, without a treaty its own nationals accused of crime, may likewise surrender foreign nationals resident on its territory.

Lincoln's Inn, September 8, 1864.¹

My Lord,

We are honoured with your Lordship's commands signified in Mr. Hammond's letter of the 19th ultimo, stating that, with reference to our Report of the 6th ultimo,² respecting the arrest of James Thornley, at Paris, by order of the French Government, on the application of the Russian Embassy, he was directed by your Lordship to transmit to us two further despatches from Earl Cowley on this subject . . . (No. 914, August 15, and No. 918, August 17³), from the latter of which we should perceive that the right to surrender criminals exists in every State independently of any Treaty of Extradition, and that such a Treaty, in fact, only makes obligatory the act of extradition, which is in the competence of every State; and Mr. Hammond was to request that we would furnish your Lordship with our opinion upon the principle laid down by the French Minister.

¹ F.O. 83. 2274: France.

² In the same volume; therein the same Law Officers advised that 'if James Thornley be a British subject, his arrest, in France, by French authorities, at the demand of Russia, is not warranted by International Law', and added that if he had been naturalized in Russia it might be necessary to modify their opinion.

³ F.O. 27, 1532, stating that the Russian Embassy in Paris had produced an 'act of allegiance to the Russian Crown signed by' Thornley.

In obedience to your Lordship's commands we have taken this case again into consideration, and have the honour to report—

That in our former Report we were careful to state that our opinion would be subject to modification in the event of its turning out to be the case, as we rather anticipated that it might, that James Thornley had taken the oath of allegiance to the Emperor of all the Russias; and if this person had not been set free, we should not, with our present information, have advised your Lordship to make any further application on his behalf. The Government of the country in which a foreigner is found residing cannot (we think) be called upon by either of two foreign nations, having conflicting claims on his allegiance (the one founded on birth, the other on naturalization), to give the preference to the one of those claims over the other.

With respect to the general question, as to the power of a State, in the absence of any Treaty of Extradition, to deliver up to another State with which it is in amity a criminal escaped from that State, we agree with M. Drouyn de Lhuys that, in the case of the criminal demanded, being a subject either by birth or allegiance, of the demanding State, it is a question of constitutional law, to be determined by each country for itself, whether it will or will not, without a specific Treaty, grant such extradition. Even with respect to a foreigner, not a subject of the State from which the demand proceeds, it would also be competent to the Government under which he is actually residing, to comply with such a demand, if there were a general law known to be in force in the country of such actual residence authorizing his extradition upon the request of any foreign Power under such circumstances. By coming to reside in that country he would have become subject to this, as to all other provisions of the local law. We do not, however, understand that any such general law is in force in France. If not, then (with great respect for M. Drouyn de Lhuys) we conceive that, by the comity of nations, an Englishman lawfully resident or sojourning in France must be entitled to the benefit of the same protection which the law of that country affords to its own subjects, so long as he commits no offence against that law.

We presume (indeed, it is involved in the assumption already made) that a natural-born Frenchman would not be liable, by the law of France, to be delivered up to the Russian Government, upon any representation which might be made by that Government to the Executive Government of France, imputing to such Frenchman the commission of a crime against the laws of Russia, at some period when he was resident in that country. We conceive it to be clear that there is not so much even as an imperfect obligation, by international law, for one nation to execute (or assist in executing) any part of the criminal law of another nation, in the absence of any Treaty to that effect; and, on the other hand, there is (as we conceive) a clear obligation upon every nation to protect, within the limits and according to the rule of its own laws, foreigners who are permitted to reside within its territory, in the same way that natural-born subjects are protected.¹

We have the honour to be, etc.,
 ROUNDELL PALMER
 R. P. COLLIER
 ROBERT PHILLIMORE

3. *Treaty obligations*

A change in British policy is marked by the Ashburton Treaty with the United States in 1842 and a treaty with France in 1843.

¹ It appears from a despatch in F.O. 27. 1532 from the British Ambassador in Paris to the Foreign Office that the French Government set Thornley at liberty.

*Crimes committed before a treaty enters into force.*¹

Doctors' Commons.

November 4th, 1842.²

My Lord,

We are honoured with your Lordship's commands signified in Mr. Addington's letter of the 3rd instant stating that he was directed to transmit to us the enclosed letter from the Home Department transmitting an application from Mr. Walter Charles Venning of Token House Yard, requesting that facilities may be afforded to him by Her Majesty's Government in apprehending and bringing to justice one, William Gilbert Knight charged with having uttered forged Bills of Exchange and said to be now residing in the United States of America.

Mr. Addington is pleased further to state that this application is made in virtue of the 10th Article of the Treaty between Her Majesty and the United States of America, signed at Washington on the 9th of August last, and of which the Ratifications were exchanged on the 13th ultimo. That it appears however that the Crime with which William Gilbert Knight is charged was committed in the month of January 1841 and we are therefore, requested to take this application into consideration and report to your Lordship at our earliest convenience our opinion whether the provisions of this article of the Treaty apply to Crimes committed previously to the date of the Treaty.

Mr. Addington also states that he is further directed to request that we would at the same time report our opinion, whether in the absence of an Act of Parliament and before an Act can be obtained authorizing Her Majesty's Government to carry into effect the 10th Article of the said Treaty in so far as it relates to Criminals, Citizens of the United States, seeking an Asylum or being found in this country, Her Majesty's Government would be able to deliver up such criminals to Justice.

In obedience to your Lordship's commands we have taken this application into consideration and have the honour to report that we are of opinion that the provisions of the 10th article of the Treaty do not apply to crimes committed previously to the date of the Treaty.

We are also of opinion that in the absence of an Act of Parliament and before an Act can be obtained authorizing Her Majesty's Government to carry into effect the 10th Article of the said Treaty in so far as it relates to Criminals, Citizens of the United States, seeking an Asylum or being found in this country, Her Majesty's Government would not be able to deliver up such Criminals to Justice on the demand of the United States Government.³

We have the honour to be &c.,

J. DODSON

FRED POLLOCK

W. FOLLETT

To the Rt. Hon. the Earl of Aberdeen.

In March 1846 (U.S.A.), Thesiger and Kelly reported⁴ that there seems to be nothing in the Treaty of Washington [1842], or in the Act of

¹ The Royal Commission on Extradition of 1878 (C. 2039) recommended that statutory power should be given to the Crown to surrender fugitives alleged to have committed crimes when there was no treaty obligation to do so; but this recommendation was not adopted.

² F.O. 83. 2207: U.S.A.

³ The necessary Act, 6 & 7 Vict., c. 76, came into operation on 22 August 1843.

⁴ Forsyth, *op. cit.*, p. 366.

Parliament [6 & 7 Vict., c. 76] founded upon it, to prevent their extending to offences committed before the date of the treaty and the time of the passing of the Act

but pointed out that the treaty with France and the ensuing Act of Parliament differed in this respect. They referred to a Report of 1843 but not to the Report of 4 November 1842, printed above.

4. *Federal states*

In a Report dated 27 March 1843¹ the Crown was advised that it was only the Federal Government of the United States of America, and not the States' Governments, that could demand extradition from Great Britain.

5. *Who may be extradited, and where they may be arrested*

In respect of categories of crimes, and categories of persons considered from the point of view of their nationality, there is little uniformity in the extradition treaties to which the United Kingdom is a party, as is apparent from Clarke.² Generally speaking, it may be said that the United Kingdom, by reason partly of the territorial conception of crime which has dominated the common law, has always regarded the main object of the treaty under negotiation to be the punishment of criminals by the state in whose territory the crime was committed, regardless of the nationality of the person accused. Consequently, the United Kingdom has habitually pressed for the surrender by states of their own nationals.

From this point of view extradition treaties are classified in a Foreign Office letter of 10 March 1893³ as follows:

- (a) Both parties agree to surrender their nationals unconditionally—which is preferred by the United Kingdom;
- (b) Optional surrender of nationals;
- (c) Both parties agree not to surrender nationals;
- (d) The United Kingdom agrees unconditionally, while the other party does not.

The point is that if a British criminal shows a proper discrimination in the crimes which he commits in a foreign country and succeeds in escaping to his own country, there is no means of punishing him here unless his crime is one of a select few.⁴

Arrest on ships in home or foreign waters. With regard to alleged fugitive criminals on board British ships in foreign waters, James, Harcourt, and Deane reported, on 3 February 1874 (Portugal)

That, in our opinion, no authority can possibly be given by the British Consul for the

¹ F.O. 83, 2207: U.S.A.; see also a Report of 19 August 1843 in the same volume.

² Op. cit., *passim*.

³ Holland.

⁴ Treason, murder, manslaughter, piracy, and a few less interesting crimes.

arrest of an alleged fugitive criminal on board a British ship [in the Tagus]. If the ship be a vessel of war, we think that no surrender can take place in Portugal, but the fugitive may be brought to England, where he can be dealt with under the Extradition Acts. If the ship be a private vessel in Portuguese waters for the purposes of trade, the public authorities in Portugal must act on their own responsibility, but the British Consul should not interfere in the matter.

Arrest on merchant ships. At any rate during a certain period, differences between the German-American and the British-American treaties of extradition made Germany a healthier country for the perpetrators of crimes in the United States than Great Britain; these persons might travel on merchant ships touching at British ports on their way to Germany. Accordingly the Home Office took the opinion of the Law Officers upon the more general question of the right to arrest persons on board merchant ships in British ports in execution of American (or British) extradition warrants.

Re T. W. HOIT.

Extradition Acts, 1870 and 1873.

The following is a copy of a letter from the Home Office:—

*July 6, 1891.*¹

Sir,

I am directed by Mr. Secretary Matthews to acknowledge the receipt of your letter of the 27th ultimo, inclosing opinion² of the Law Officers of the Crown to the effect that, in the case of T. W. Hoit,³ the obstruction offered to the police by the officials of the Hamburg-American Steam-Packet Company was not such as would subject them to criminal proceedings. Mr. Matthews has communicated this opinion to the Secretary of State for Foreign Affairs.

The Secretary of State, however, considers it important that he should be further advised by the Law Officers as to the course which should be taken by the police to effect an arrest in any future case in similar circumstances. As the recent Extradition Treaty between Great Britain and the United States comprises many offences, *e.g.*, larceny and embezzlement, which are not comprised in the Treaty between the United States and Germany, it is probable that criminals from the United States may attempt to escape to Germany rather than to England; that applications may be made by the United States' Government for their arrest at British ports at which German vessels touch; and that if the officials of the Company can successfully oppose the arrest on board their vessels, the only opportunity of bringing the criminals to justice may be lost.

Moreover, the English Government has not unfrequently occasion to apply for the arrest of fugitives at ports in foreign countries where the vessels on which they have sailed merely touch, and it is most desirable that it should be clearly shown that this can be done reciprocally.

The Secretary of State desires, therefore, to be advised by the Law Officers what steps the police are justified in taking in order to execute either an English or an extradition warrant for the arrest of a fugitive criminal—

(*a.*) On board a British vessel;

¹ United States of America.

² Not printed because of purely domestic importance.

³ Nationality not stated.

(b.) On board a foreign vessel within the British territorial waters, if the owners or their agents refuse to allow the police to go on board the vessel.
I am, &c.

GODFREY LUSHINGTON.

The Solicitor to the Treasury.

The cases laid before the Attorney- and Solicitor-General on the 20th June, and their opinion thereon of the 26th June, 1891, are sent herewith.

The Attorney- and Solicitor-General are requested to favour Mr. Secretary Matthews with their opinion as asked in Mr. Lushington's letter of the 6th July.

Extradition Acts, 1870 and 1873.

Re T. W. HOTT, a Fugitive Offender.

The Attorney-General's Opinion.

In my opinion, subject to the provisions of 'The Mail Ships Act, 1891,' a warrant for the arrest of a person, whether issued in respect of a crime committed in England or under the authority of the Extradition Acts, can be executed on board a British vessel whether in British territorial waters or on the high seas, or on board a foreign vessel (not being a public ship) while such vessel is within British territorial waters; and that the owners, or their agents, are not entitled to prevent the police authorities, when duly armed with a warrant of arrest, from boarding for the purpose of executing such warrant.

RICHARD E. WEBSTER,
Attorney-General.

Royal Courts of Justice, November 7, 1891.

The Solicitor-General's Opinion.

In my opinion, an extradition warrant can only be executed upon a foreign vessel in British waters when such vessel belongs to the Power claiming extradition, and the fugitive is either a British subject or a subject of such Power.

In other respects I agree with the opinion of the Attorney-General.

EDWARD CLARKE,
Solicitor-General.

Royal Courts of Justice, November 7, 1891.

The preceding opinion of Webster was elaborated and approved in 1893 (Spain).

April 5, 1893.

My Lord,

We were honoured with your Lordship's commands (relative to a question of jurisdiction over a foreign merchant-ship in British waters) signified in Sir Thomas Sanderson's letter of the 18th March last, stating:

That a Spanish subject named Fernel had absconded from the Spanish Colony of Manila, having been accused of the embezzlement there of 12,000 dollars. That on the request of the Spanish Consul at Hong Kong, a provisional warrant had been issued for Fernel's arrest in the event of his arriving at Hong Kong, with the view to his extradition.

That Fernel had arrived in the harbour of Hong Kong on board a Spanish vessel, the 'Don Juan,' and that whilst the British police were searching that vessel, an officer and boat's crew from the Spanish man-of-war 'Reina Christina,' which happened to be in port, had boarded the 'Don Juan,' seized the man Fernel, and had him taken on board the Spanish man-of-war, refusing to give him up to the police.

That the Governor of Hong Kong had requested that the man should be handed over to the territorial authorities, and that this request appeared to have been eventually complied with, after some correspondence between the Governor and the Spanish Consul, who maintained that the 'Don Juan' retained, in regard to this circumstance, immunity from the jurisdiction of such territorial authorities.

That Fernel was subsequently brought before the Magistrate at Hong Kong upon extradition process in the ordinary manner, and after having been committed to gaol for the statutory period of fifteen days, which must elapse before a surrender by way of extradition, he had doubtless since been handed over to the Spanish Government, although that fact was not actually stated in the correspondence.

That this particular incident had thus been closed satisfactorily, but that the Governor of Hong Kong had suggested that the matter should be represented diplomatically to the Spanish Government with the view to the prevention of similar incidents in the future.

That no case involving considerations of an exactly analogous nature had, so far as was known to the Foreign Office or to the Admiralty, to whom special reference had been made, yet arisen.

That in 1891, however, a case, certain aspects of which it might be useful to consider in connection with the present inquiry, had arisen. That on that occasion the United States' Government had claimed the extradition of T. W. Hoit, a fugitive from the justice of the United States, who was on board of a German mail-steamer within British territorial waters off Southampton, and our attention was called to the reports given upon this case by our predecessors and dated the 26th June and the 7th November, 1891, respectively, from the latter of which it appeared that Sir R. Webster had differed in opinion upon the subject from Sir Edward Clarke, who had considered that an extradition warrant could only be executed upon a foreign vessel in British waters when such vessel belonged to the Power claiming extradition, and the fugitive was either a British subject or a subject of such Power.

That it appeared to your Lordship that all questions regarding the apprehension of persons in British territorial waters must primarily be governed purely by considerations of English municipal law, and that in such case the question whether a particular person was or was not wrongfully arrested was a question which would have to be decided (either on *habeas corpus* or otherwise) by a British Court administering English or British colonial law, according to the circumstances of the particular case.

That it would therefore seem first necessary to determine what was the municipal law upon the point.

But that, assuming that the municipal law would entirely negative the right of any foreign authority to execute arrests in British waters, even upon the persons of their own nationals on board of merchant-vessels of their own nationality, it was still advisable from the point of view of diplomatic controversy to consider how far international law and practice might afford arguments in support of any such usage.

That on this point Sir Thomas Sanderson was to refer us to a passage in Mr. Hall's 'International Law' which appeared concisely to summarize the extent and character of modern doctrine on this question, and which would be found in the third (1890) edition of that learned author's work at p. 198 *et seq.*

That Mr. Hall, after pointing out that French practice, and also to a certain extent French municipal law, recognized the immunity of merchant-vessels lying in the ports of a foreign State from the local jurisdiction more absolutely and widely than does the law and practice probably of any other State, added that outside France little disposition had been shown to put forward as representing actual law the views which there obtain, and further stated that it was unquestionable that these views 'are at present destitute of international authority since they are not supported by the long continuance and generality of usage, which in the absence of consent are needed to give legal value to a practice derogating from so fundamental a principle as is that of sovereignty.'

That it appeared to your Lordship, as then advised, that the release of Fernel by the Spanish authorities, in consequence of the representations of the Governor of Hong Kong, sufficiently justified the assumption that any claim to arrest him as of right while on a Spanish merchant-vessel in British territorial waters might, if it were ever intended seriously to be raised, now be regarded as abandoned and withdrawn by the Spanish Government, and that under those circumstances any formal representation of the case to that Government might be unnecessary if not impolitic.

That your Lordship would, however, before making any further communication to the Colonial Office, be glad to be informed—

(1.) Whether we concurred in this view, or whether we considered it necessary or desirable that any, and if so, what, representation should be addressed to the Spanish Government in connection with the arrest, release, and subsequent extradition of Fernel under the circumstances to which our attention had been called.

(2.) Whether, in our opinion, the action of the Governor of Hong Kong in the matter might be approved.

(3.) Whether we agreed generally with the views indicated in Sir Thomas Sanderson's letter as to the bearing of municipal and international law respectively upon the main question under discussion, or, if not, in what respects, and to what extent we differed from them.

(4.) Whether we adopted in its entirety the opinion given with respect to the case of T. W. Hoit by the late Attorney-General on the 7th November, 1891, or whether we only concurred in that opinion subject to the limitation added by the late Solicitor-General, which would confine its application to cases in which it was sought to execute an extradition warrant 'upon a foreign vessel in British waters, when such vessel belongs to the Power claiming extradition and the fugitive is either a British subject, or a subject of such Power'.

That Sir Thomas Sanderson was to add that your Lordship would be glad at the same time to be favoured with such other observations upon the subject generally as we might think it desirable to offer.

In obedience to your Lordship's commands we have taken the matter into consideration, and have the honour to

Report—

1. That we concur in the view that under the circumstances no formal representation to the Spanish Government is necessary.
2. That in our opinion the action of the Governor at Hong Kong may be approved.
3. That we agree generally with the views indicated in Sir Thomas H. Sanderson's letter of the 18th March, 1893.
4. That we adopt in its integrity the opinion given with respect to the case of T. W. Hoit by the late Attorney-General on the 7th November, 1891.

Whatever conclusions may ultimately be arrived at as to the concession to foreign Governments of jurisdiction over their own nationals in private ships of their own nationality lying in British ports, we do not think that any rule or principle of international law requires Her Majesty's Government to permit the exercise of such jurisdiction by force within British waters.

We have the honour to be, etc.

C. RUSSELL

JOHN RIGBY

The Rt. Hon. the Earl of Rosebery

6. *Position of a 'third state', the extradition of whose national has been demanded by State A of State B¹*

It often happens that the alleged criminal is the national neither of the demanding nor of the surrendering state. Has his own state any right to object to his extradition?

On 10 February 1846² Dodson, Thesiger, and Kelly reported that

The surrender of such fugitives [under a treaty] cannot properly be resisted by the Government [of a third State] whose subjects they may be.

On 10 February 1871 (Switzerland), in a case where France was claiming from Switzerland the extradition of a British subject for theft committed in France, Collier, Coleridge, and Twiss advised against raising any objection, on the ground that

a British subject voluntarily taking up his residence in a foreign country subjects himself to the laws of that country, and among them to its extradition laws.

7. *Demand for surrender based on a foreign condemnation par contumace*

In some foreign countries a person who is not in custody and declines to surrender himself may be condemned by the court *par contumace*. Demands for the surrender of such persons made upon Great Britain are resisted. In or about the year 1866, on the suggestion of Sir Thomas Henry,³ the chief magistrate at Bow Street, the Home Office sought the opinion of the Law Officers on this question and was advised that persons condemned *par contumace* could not be extradited from Great Britain.⁴

But when the question came before Lord Chancellor Chelmsford in *In re Coppin*⁵ upon a writ of habeas corpus, he declined to accept this view and, after examining the French law and the nature of a condemnation *par contumace*, made an order for the surrender of Dubois who had been condemned in France *par contumace*.

¹ The English courts find no difficulty in surrendering such a person provided that there is nothing to the contrary in the treaty: *R. v. Ganz* (1882), 9 Q.B.D. 93.

² F.O. 83. 2269; France.

⁴ Clarke, *op. cit.*, p. 156. I have not found this Report.

³ *D.N.B.* (1807-76).

⁵ (1866), L.R. 2 Ch. App. 47; Clarke, *op. cit.*, pp. 156-63.

It does not appear, therefore [he said], that the trial of a person condemned *par contumace* differs at all from that of a party who is put upon his trial without any previous condemnation. But, if in order that no part of the argument for the prisoner may be disregarded, I should assume that the judgment *par contumace* does work some prejudice to the party upon the trial, either by reducing the amount of necessary proof, or by changing its character, or by making him liable to costs, how could that possibly take him out of the category of accused persons? He has ceased to be a person condemned, because his condemnation is annulled upon his appearance, and he is to take his trial for offences with which he stands charged. What better, I ought rather to say what other, description of him could be given than that of a person accused?

It is important to note that the treaty under which the surrender of Coppin was demanded specifically provided for the surrender of persons 'accused' of certain crimes.

The Extradition Act, 1870, authorizes the extradition both of 'accused' and of 'convicted' persons and Section 26 provides that

The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy.

Accordingly, Great Britain declines to recognize convictions *par contumace* as the basis of a demand for surrender, and excludes them from extradition treaties. Thus, on 25 September 1874, Baggallay, Holker, and Deane, reporting on a demand for surrender based on an Italian sentence of this character, stated the British principle to be that

before any fugitive prisoner can be surrendered by this country, proof according to the law of this country is required sufficient to have justified the *arrest* of the person whose extradition is demanded had the crime charged been committed here.¹

Clarke² points out that the term 'conviction for contumacy' is a mis-translation; a conviction *par contumace* would be more correctly described as a conviction in default of appearance; contumacy is not a crime in the sense that murder or larceny is. *Par contumace* does not mean 'of contumacity' but 'by reason of contumacity'. The moral appears to be that when the extradition of such a person is demanded, he should be described as a person 'accused' of an extradition crime, not as a person 'convicted'.

8. *Trial for an offence other than that forming the basis of the extradition*³

On 25 February 1865, in the case of *Burley*,⁴ surrendered by Great Britain to the United States of America, the Law Officers reported that if

¹ Repeated by the same Law Officers on 11 October 1875 (Italy).

² p. 233. On 4 March 1907 the Crown was advised that a plea of *autrefois convict* based on a Swiss condemnation *par contumace* would fail in an English prosecution, as that plea must rest on a final conviction.

³ The case of *Lamirande* occurs in some of the books; he was prematurely, and perhaps erroneously, surrendered from Canada to France, and the Law Officers in a series of Reports in 1866 (France) advised that France was not legally bound to return him; this case is fully treated in Clarke, *op. cit.*, Appendix, pp. cccxcv-d.

⁴ Clarke, *op. cit.*, p. 103.

he was first tried for the extradition crime the British Government could not object to any later prosecution for a crime committed within the territory of the United States of America—*semble*, whether committed before or after the extradition. However, Section 3 (2) of the Extradition Act, 1870, provides that

A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

On 25 October 1875, on the question whether *Lawrence*, unconditionally surrendered by Great Britain to the United States of America under treaty, could lawfully be tried for an offence other than the extradition crime, the Law Officers made three separate Reports, which may be summarized as follows:

Baggallay: no objection, whether he is first tried for the extradition crime or not.

Holker: the objection is valid, whether he is first tried for the extradition crime or not; if that crime is not established, there is an implied condition that the right to afford him asylum revives.

Deane: no objection as to what happens later if he is first tried for the extradition crime.

Baggallay and Deane concurred in stating that the waiver by the accused of his right (if any) to be first tried for the extradition crime in no way prevents the British Government from making any objection that may be open to it on this point.

A United States Circuit Court held that, notwithstanding his extradition, he could be indicted for three offences committed before he departed to Great Britain and different from those for which he was extradited.¹

Leada Lamontagne was extradited from the United States of America to Canada on a charge of arson and was then called as a witness on the trial of her brother for murder and sentenced to imprisonment for contempt for refusal to testify. Webster and Clarke reported on 29 February 1892 (U.S.A.) that, while it would be useful to establish the principle

that the fugitive is delivered up for the sole purpose of being tried for the offence for which he was surrendered, and that in regard to other matters occurring previously to his extradition, he is not to be regarded as being subject to the jurisdiction of the Government which obtains his surrender until he shall have had an opportunity to leave it and return to the jurisdiction of the surrendering Government,

¹ See Clarke, *op. cit.*, p. 82. It appears that finally he pleaded guilty to an indictment 'which charged him substantially with the crimes for which he had been surrendered'.

this had not yet been established as the law in the United States of America and was clearly not the law in the United Kingdom: see *Pooley v. Whetham*.¹

They approved as statements of the law a Home Office letter of 6 November 1891, and a Memorandum by Godfrey Lushington endorsed thereon.

On 8 March 1907 (France) Walton and Robson, advising on Section 19 of the Act of 1870 and Article IV of the Treaty of 1876 with France, reported that no objection could be taken to the conviction in France of one *Thriot*, who

was tried for the crime specified in the Magistrate's warrant, and, though not convicted of that crime, . . . was convicted of another extradition crime, proved by the facts on which his surrender was grounded.

Surrender by receiving state to another state. On 24 March 1874 the Belgian Government, having inquired whether they would be violating their extradition treaty with Great Britain if they handed over to the French Government a person surrendered by Great Britain to Belgium and tried there, after serving his sentence, Baggallay, Holker, and Deane said: No. (To the same effect Lord Chancellor Cairns on 15 August 1876, Belgium.)

9. *Miscellaneous.*

Effect of suspicion that an alleged criminal if extradited will be tortured.

Upon a demand for extradition to China, James, Herschell, and Deane reported on 18 September 1864 as follows:

Dealing first with the more general question relating to the infliction of torture upon rendered [*sic*] criminals, we are disposed reluctantly to agree with the views expressed by the Attorney and Solicitor-General in their Opinion of the 25th November, 1865, and we think that under the XXIst Article of the Treaty of Tien-tsin Her Majesty's Government cannot of strict right refuse to deliver a criminal on the ground that there is reason for suspecting that torture will be applied to such criminal. But humanity requires that every step shall be taken, possibly even to the extent of determining the treaty, to prevent the action of the British Government assisting in any way the infliction of torture.

This opinion was substantially repeated by Webster and Gorst on 18 September 1885 (China).

Erroneous surrender. In the case of certain Cuban political convicts who escaped from Cadiz to Gibraltar and were erroneously handed over by British officials to a Spanish consul, James, Herschell, and Deane, in a Report of 4 November 1882, advised that there was no legal basis for a

¹ (1880), 15 Ch. D. 435, where it was held that the provisions of s. 19 of the Extradition Act, 1870, did not protect a person surrendered to the United Kingdom, on a charge falling within the Act and the treaty with France, from being attached for an earlier disobedience of an order of the Court made in a civil action.

claim for their restoration to Gibraltar though the Spanish authorities ought not to have taken advantage of the mistake arising through the action of the Spanish consul in demanding the surrender. The *Savarkar* case in 1910 (which will be dealt with elsewhere under the title of 'Independence of States') is not a case of erroneous surrender, because the French Government had agreed with the United Kingdom that he should remain in British custody while on French territory (see Scott, *Hague Court Reports*, pp. 516-20).

Offences of a political character. Here the wheel has come full circle. For many centuries monarchs and other governments were accustomed to oblige one another by surrendering political criminals, whether required by treaty to do so or not. But during the nineteenth century there was almost a complete reversal of opinion, and now the practice of excluding offences of a political character from the category of extraditable offences is widespread. The Parliament of the United Kingdom took a strong line in the matter, and Subsection (1) of Section 3 of the Extradition Act, 1870, provides that

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

I am not aware of any Reports of the Law Officers in which they have attempted to define an 'offence of a political character'. Two judicial decisions *Ex parte Castioni*,¹ and *In re Meunier*² shed a little light on the matter.

Deserting seamen. Seamen may desert their ships in order to secure better wages or other conditions or for some other reason, and at one time demands were made by one government upon another for help in restoring them to their ships. On 14 October 1872 (General), Coleridge, Jessel, and Deane advised that the right to search for British naval deserters was limited to British ships on the high seas or in British waters. This Report was confirmed on 7 August 1873 (General), with the addition that 'no customary right of search [for naval deserters] . . . exists'.

No objection can be taken to the removal from a British merchant ship while in port in a foreign country of members of the crew who are nationals of that country and have committed the offence of desertion by its law.³

¹ [1891] 1 Q.B. 149.

² [1894] 2 Q.B. 415.

³ F.O. 83, 2371: Spain. Phillimore on 23 June 1866, Ecuador: 'English merchant vessels and steamers not carrying Her Majesty's Commission are subject to the jurisdiction of the State in whose ports they happen to be.'

Doctors' Commons

August 9 1859.

My Lord,

We are honored with your Lordship's commands signified in Lord Wodehouse's letter of the 4th instant, stating that, with reference to our reports of the 31st of December 1858 and 18 of June last, upon the subject of the right claimed by the Spanish Admiral at the Havana to take Spanish Sailors out of British Merchant Ships, Lord Wodehouse was directed by your Lordship to transmit to us a Despatch from Her Majesty's Minister at Madrid, forwarding the opinion which he was directed to procure, of an eminent Spanish lawyer upon this subject, and your Lordship was pleased to request our opinion whether any steps can be taken by Her Majesty's Government in this matter.

In obedience to your Lordship's commands, we have carefully considered the same, and have the honor to report that

If the Law of Spain be (as we collect that it is, from the opinion transmitted to us) that a natural born Spanish subject, who has been registered as a Seaman in conformity with the law of Spain, is, by that Law, guilty of the crime of desertion if he ships himself on board a foreign ship without the license of the proper Spanish authority, then, we are of opinion that no complaint can be made of the conduct of the Spanish Admiral, in arresting and removing from on board an English Merchant Vessel, when in the Spanish Port of Havannah, the Sailors in question being, as we collect, Spanish subjects, and also (on the assumption aforesaid) criminals by the law of Spain.

We are therefore of opinion that Her Majesty's Government cannot, (if the circumstances of the case are such as we have stated) take any further steps in the matter.

We have the honor etc.

J. D. HARDING

RICHARD BETHELL

HENRY KEATING

To: Lord John Russell, M.P.

On 30 December 1866¹ Dodson reported that there was no obligation upon states by 'general mercantile law' to restore deserting seamen to their ships, and on 4 November 1882 (Spain) James, Herschell, and Deane reported that

the action of the Colonial Administrator [of British Honduras], in arresting and surrendering the deserter [from a Spanish man-of-war], and in transmitting him in custody through the United States [to the Spanish authorities in Havana], should be disapproved.

Exterritorial Asylum²

1. *Meaning of expression 'right of asylum'*

This is a popular and elliptical expression which will not bear analysis from a legal point of view. What we are concerned with is the circumstances, if any, in which one state has a right to grant to an individual an

¹ F.O. 83. 2286.

² The following are some British authorities on Asylum: Report of the Royal Commission on Fugitive Slaves, 1879 [C. 1516-I]; Morgenstern in this *Year Book*, 25 (1948), pp. 236-61 and 382-6; *ibid.* 26 (1949), pp. 327-57; and *Law Quarterly Review*, 67 (1951), pp. 362-82.

asylum which must be respected by other states. It is almost unnecessary to point out the difference between the protection afforded by a state to a refugee by granting him an asylum in or upon its diplomatic or consular buildings or public ships, and the protection which a refugee obtains by escaping to, or remaining upon, the territory of a state other than the state that 'wants' him, unless and until in the latter case the protection is terminated by his extradition. We are now concerned with the former.

2. *Asylum on board foreign public ships*

In 1733 in the case of an alleged foreign murderer who had been received on board a British ship of war in a foreign port, Paul¹ advised that he could not be removed by force without a violation of British sovereignty, but ought to be surrendered to the local authorities for trial. Refuge on a British merchant ship was also mentioned.

Most Noble.

I have proposed a Report to be laid before His Majesty when Your Grace shall think proper, it is relating to a murder committed in the Port of Genoa, the murderer afterwards took refuge on board His Majesty's Ship the Drake Sloop, with the utmost Duty I am My Lord Your Graces

Most Obedient Servant
GEORGE PAUL

Doctors Commons, Sept 20th 1733.
To the Kings Most Excellent Majesty.
May it please Your Majesty

In humble obedience to Your Majesty's Commands, signified to me by His Grace the Duke of Newcastle, Your Majesty's principal Secretary of State, referring to me the copys of a Memorial presented by the Secretary of Genoa, and of a letter from Captain Compton, Commander of Your Majesty's Ship the Drake Sloop, and also extracts of two letters from Mr. Bagshaw Your Majestys Consul at Genoa relating to a French Murderer who having taken refuge on board Your Majesty's said Ship, then in that port, was demanded both by the Government of Genoa, and by the French Consul there, upon which Captain Compton being uncertain to whom the said murderer ought to be delivered up, determined to keep him in custody till he should receive orders from the Lords Commissioners of the Admiralty upon this head, acquainting me that it was Your Majestys pleasure that I should consider this case, and report my Opinion what Orders were proper to be sent upon it, and also that I should observe what Consul Bagshaw mentions in his letter: that the Secretary of State of Genoa told him that if the said murderer had fled on board a Merchant Ship, they (the Government of Genoa) would have taken him out themselves, which the Consul seems to apprehend would have been an act of violence to the British Colours, and to give my opinion how far the Consul may be right in his judgment in this respect, and what ought to have been done if that had been the case.

¹ S.P. (Naval) 42. 138. In an undated Report by Sir James Marriott, appointed Advocate-General in 1764, printed in Forsyth, *op. cit.*, p. 217, there is an indirect reference to exterritorial asylum: 'With respect to such crimes of violence as may be committed within the house of a public [diplomatic] minister, if he can give an asylum to foreigners (a privilege of which I doubt the justice and reciprocal utility, though some have asserted it), he might *a fortiori* protect persons of his own suite against a foreign jurisdiction. . . .'

The fact as set forth in the Memorial and other Letters appears to have been committed on board the Ship Notre Dame de la Garde of Marseills, by Charles Ugues a Frenchman, who about two a clock in the morning of the second of August last, stabbed the Mate or Pilote Peter Clements, with a knife in the body, of which he died three hours after, and about four o'clock that morning the said Charles Ugues swam from his ship to the Drake Sloop. The same morning Charles Pailera Master of the Ship Notre Dame de la Garde, came on board the said Sloop and desired Captain Compton to secure the murderer, and he now remains in custody on board the Drake Sloop at Port Mahon. Your Majesty having directed me to consider this case and report my opinion what orders were proper to be sent upon it, I most humbly beg leave to certifie Your Majesty that Charles Ugues the murderer being on board one of Your Majesty's Ships of War is as much under the protection of the Crown of Great Britain as if he were on shore in any part of your Majestys Dominions, and that no Prince or State can or ought to take him from on board Your Majestys Ship without Your leave and permission first had and obtained. But this being a case of a very heinous nature, and such that should this man not be brought to justice it might be of very bad consequences to Seafaring Men of all Nations, and prejudicial to Trade and Navigation, Therefore I humbly conceive he may properly be delivered up to the Common Course of Justice. And as the fact was committed in the port of Genoa, I think that by the Laws of Nations the Tryal ought to be where the offence was committed, and that he can't so properly be delivered to the French Consul to be sent to Marseills. If this Criminal had taken shelter on board a Merchant Ship belonging to Great Britain he ought not to have been taken from thence without the approbation of the Consul, if he had it would have been a foundation for complaint.

All which is most humbly submitted &c.,

G. PAUL

Doctors Commons, Sept. 20th 1733.

Lord Stowell's Opinion of 18 November 1820 on the case of John Brown. As the Report¹ of the Royal Commission on Fugitive Slaves of 1876 is not a very accessible document outside the United Kingdom, it is necessary to make the following extract from the Memorandum (annexed to it) by H. C. Rothery, the Registrar of Ecclesiastical and Admiralty Causes, a member of the Commission. Lord Stowell's description of ships, including, it would seem, ships of war, as 'mere moveables' is perhaps somewhat extreme, but the main point requiring to be noted is that he is contesting, though not in terms, the doctrine of the extrterritoriality of public ships.

It seems that in the revolt of the Spanish Colonies in 1819-20, John Brown, an Englishman, commanded one of the insurgent vessels, but having been taken prisoner by the Spaniards, he was put into prison at Lima. He subsequently escaped and took refuge on board Her Majesty's ship 'Tyne', which was at the time lying in the harbour. The Spanish authorities demanded his surrender, but Captain Falcon holding apparently the same views on the subject as Historicus, refused to give him up, stating

¹ This Report (C. 1516-I of 1876) is, for the international lawyer, full of meat of good quality, extending far beyond fugitive slaves. Lord Stowell, as Sir William Scott, after becoming Judge of the Admiralty Court in 1798, was frequently consulted by the Government on general questions of policy. The Appendix to the Report, pp. 224-7, contains the relevant official correspondence on this incident and Robinson's Report.

that 'the power of complying with such a demand did not rest with the commander of any national ship;' and that if he did so, he should be 'compromising those rights which all civilised nations admit to belong to the national ships of friendly powers'. Captain Falcon afterwards brought the prisoner to England, and on the case coming under the notice of the Admiralty, a minute was drawn up by Lord Melville, then the First Lord, which is in the following terms:¹

Minute of Lord Melville.

25th October, 1820.

Send copies of this letter and enclosures and the case and opinion of the King's Advocate to Sir William Scott, and acquaint him that as there did not appear to their Lordships or to the King's Advocate, to whom they referred the question, to exist any legal and sufficient grounds on which Mr. John Brown, the individual alluded to in those papers, who had arrived in H.M.S. 'Tyne', and was actually within the realm, could be detained in custody, their Lordships have accordingly given orders for withdrawing any restraint over him, and for allowing him to come on shore.

But it appears to their Lordships that another and more important question of a general nature is involved in the discussion between the Viceroy of Lima and Captain Falcon: and as their Lordships must be prepared either to disavow or to maintain and defend on this and all other similar occasions the principle for which Captain Falcon contends, viz., that any British subject coming on board one of Her Majesty's ships in a foreign port, though escaping from a civil or criminal process in such port, and from the jurisdiction or supposed jurisdiction of the State within whose territories such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland, their Lordships are desirous of ascertaining from Sir William Scott to what extent they will be warranted in asserting and maintaining such a principle. Their Lordships are the more anxious to have this question considered, as they have reason to believe that an opinion prevails very generally among the officers of the British navy that they are not at liberty to withhold the protection above described; and if it should appear that such opinion is erroneous, and is not founded on any sound principle of the Law of Nations, the present opportunity may afford conveniently the means of promulgating a more correct doctrine.

Their Lordships, however, do not desire or expect from Sir William Scott a statement of all possible cases in which it might be proper or justifiable in the Commander of H.M. ships to afford protection to a British subject repairing on board such ship in a foreign port; they merely wish to ascertain whether there exists any such distinct rule in the Law of Nations as is contended for by Captain Falcon, and supposing any such rule or principle to be recognised, how far it applies to the case which forms the subject of the enclosed correspondence.

M.

In reply, Lord Stowell, then Sir William Scott, wrote the following letter which is so admirably expressed, and so directly to the point, that I set it out at length:—²

Sir William Scott to the Secretary of the Admiralty.

Opinion.

Grafton Street, 18 November, 1820.

Sir,

I have to acknowledge the receipt of your letter dated 25th ultimo, enclosing copies of a letter and its enclosures from Captain Falcon of His Majesty's ship 'Tyne', and of

¹ *Admiralty Correspondence, &c.*, p. 226.

² *Ibid.* [Note in the Report.]

the case and opinion of the King's Advocate relative to Mr. John Brown, a native of Ireland, who, being a prisoner in the hands of the Spaniards, effected his escape, and came on board the 'Tyne' at Callao, and has since arrived on board the same within the realm of England (having claimed the protection of the flag), and acquainting me that their Lordships conceiving that they had no authority to detain him, and being supported in that opinion by the concurrence of the King's Advocate, had allowed him to depart without restraint. Upon his statement I have no observation to make, not being desired by their Lordships to make any; but if my opinion had been required, I would have coincided with what has been advised and done. A more extensive and important question is proposed to me, viz., whether any British subject coming on board His Majesty's ships of war in a foreign port, escaping from civil or criminal process in such port, and from the jurisdiction of the State within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland. Upon this question, proposed *generally*, I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension is unfounded in point of principle, is injurious to the rights of other countries, and is inconsistent with those of our own.

The rights of territory are local and are fixed by known and determinate limits; ships are mere moveables, and are treated as such in the general practice of nations. It is true that armed neutralities have attempted to give them a territorial character, but the attempt when made has always been most perseveringly and at all hazards resisted and defeated by the arms of our own country, as inconsistent with the rights of hostility and capture. No such character is allowed to protect ships of war when offending against the laws of neutrality upon the high seas, where no local authority whatever exists; still less can it be claimed when there is a visible and acknowledged authority belonging to an independent state in amity with the nation to which the ship of war belongs. Such a claim can lead to nothing but to the confusion and hostility which wait upon conflicting rights.

The common convenience of nations has for certain reasons and to a certain extent established in favour of foreign ships of war, that they themselves shall not be liable to the civil process of the country in whose ports they are lying; though even this immunity has been occasionally questioned. But that individuals merely belonging to the same country with the ship of war are exempted from the civil and criminal process of the country in its ordinary administration of justice by getting on board such ship, and claiming what is called the protection of its flag, is a pretension which, however heard of in practice occasionally, has no existence whatever in principle.

If the British flag converts a ship of war into British territory, the flags of other nations must be allowed to possess the same property in favour of their marine; for there is no principle whatever that can appropriate it exclusively to the British flag. It therefore must be allowed reciprocally, that a Spaniard getting on board a Spanish ship of war lying in Portsmouth or Plymouth harbour shall be protected from British justice. I believe that the administrators of that justice would return a very speedy and decisive negative to any such protection urged on behalf of a Spaniard charged with being emenable to British law. But the inconvenient effects of considering such a ship as Spanish territory would go much further—to the extent of protecting even a British criminal who found his way into her; for no process of British justice can be executed upon a British subject in a foreign territory.

When I give this as my decided persuasion upon this subject generally, I do not mean to say that in the infinite possibility of events cases may not arise in which such a

protection might be indulged. But such cases are justified only by their own peculiar and extraordinary circumstances, which extend no further than to those immediate cases themselves and furnish no rule of general practice in such as are ordinary.

How far the case of Mr. Brown comes within such a description I am not enabled to state confidently by any exact knowledge of the facts, and particularly of the nature and validity of that authority under which the acts charged upon him by the Spaniards are said to have been committed. It would be improper in me to define that which the British Government has not thought proper to define. Holding the opinion that before any Act of Parliament or Proclamation issued it was unlawful for a British subject to accept a hostile commission from any persons, either in war or in rebellion against a State in amity with the Crown of Great Britain, I am led to think that the Spaniards would not have been chargeable with illegal violence, if they had thought proper to employ force in taking this person out of the British vessel, and I add that it is certainly very undesirable to furnish occasions for the lawful use of force in the intercourse of friendly nations.

Taking the authority under which Brown acted to be clearly invalid (which I do not mean to assert), I think it might possibly appear that Captain Falcon's act was more to be commended for its humanity and spirit than for its strict legality.

WILLIAM SCOTT

On the receipt of this opinion a copy thereof was forwarded to the Foreign Office, and Lord Castlereagh, in a letter dated the 29th of December 1820, addressed to the British Minister at the Court of Spain, thus expressed himself:¹

Your Excellency will find it easy, from these papers, to give such an explanation of the circumstances which attended the liberation in England of this individual, as will be satisfactory to the Spanish Minister. You will at the same time, on the part of your Court, disavow Captain Falcon's conduct in rescuing Brown on board his ship within a Spanish port, and not delivering him up, upon the requisition of the Local Authorities. The officer, no doubt, acted upon a good motive, but in assuming that the British flag could protect him against the legal process of the Territorial Jurisdiction within which the parties then were, was to maintain a principle, which the British Government desire distinctly to disclaim as not consistent with their uniform practice, or with the Law of Nations.

CASTLEREAGH

In 1825 Robinson stated that British ships of war in foreign ports are not authorized to afford protection to persons evading or resisting local justice.

Doctors' Commons.

June 22nd 1825.²

Sir,

I am honoured with your Commands signified in Mr. Planta's Letter of the 17th inst. transmitting the Extract of a Letter from His Majesty's Consul General for Peru, requesting Instructions for his guidance in Cases, where British Subjects, in consequence of prosecutions for debt, escaping from Prison, have taken refuge on board of one of His Majesty's Ships, and have obtained in resistance of process the protection of her Commander; and you are pleased to request that I will report my Opinion thereupon, for your Information.

¹ *Admiralty Correspondence, &c.*, p. 227. [Note in the Report.]

² F.O. 83. 2317: Peru.

In obedience to your Commands I have the honour to report that it has been held in repeated instances that British ships lying in the Ports of a Foreign Country, are not authorized to receive Persons, though British Subjects, seeking refuge on board of such Ships in evasion, or resistance of the process of the law of the Country to which they may be amenable by reason of their residence there and of Acts done by them in the Country. Such Persons may be taken by due process of the Law of the Country: And it will be advisable that the Consuls should act in conformity to that principle in all applications made to them on behalf of such Subjects.

I have the honour to be &c.,

CHRIST. ROBINSON

The Rt. Hon. the Secretary Canning.

On 10 August 1841¹ Dodson reported that a British consul is under no obligation to surrender to the local authorities, or to a foreign consul, a foreigner to whom he has extended protection, but the circumstances are not sufficiently stated to make the Report of much value.

On 12 June 1843,² in the case of a woman who had been removed by the local authorities from 'a boat belonging to a French man-of-war lying in the harbour of Buenos Aires', Dodson reported that:

I am of opinion that a Person, by merely seating himself in an English Man of War's Boat, whilst lying in a Port or Harbour of a Foreign Country, cannot thereby entitle himself to the Protection of the Officer and Crew of the Boat against the Law of such Country. The Courts of Justice in England would not for a moment hesitate to enforce their Process against any Person, although he might have succeeded in getting on board the Boat of a Foreign Ship of War in an English Port.³

In 1847 Dodson advised that ordinary criminals (as contrasted with political refugees) finding refuge on board British ships of war in foreign ports ought to be surrendered to the local authorities.

Doctors' Commons.

May 18th 1847.⁴

My Lord,

I am honoured with Your Lordship's commands signified in Mr. Stanley's letter of the 17th instant stating that he was directed to request that I would report to your Lordship at my earliest convenience what has been held under the Law of Nations as to the case of persons flying from Justice (and not escaping merely from political opponents in time of confusion) taking refuge on Board a British Man of War in a friendly Foreign Port, and to request that I would report to your Lordship my opinion whether such persons should be given up to the Foreign Authorities, or, should be protected and sent away.

In obedience to your Lordship's commands I have the honor to report that I am not aware of any case of a demand for the delivery up of Persons flying from Justice and taking refuge on board a British Man of War *whilst lying in a Friendly Port*.

But looking to general principles I see no reason why such persons may not very

¹ F.O. 83. 2369: Spain.

² F.O. 83. 2227: Argentine.

³ There are also two Reports by Dodson of 17 February 1844 and 31 July 1845 (Brazil) regarding Brazilian slaves finding refuge on British ships of war.

⁴ F.O. 83. 2325: Portugal.

properly be given up at the request of the Authorities of the country in which the offence has been committed, and in the Port of which the British Man of War is lying.

If the criminal had taken Refuge on Board an English or other Neutral *Merchant Vessel* lying in the harbour there can be no doubt that the Local Tribunals might have insisted upon his being given up for Trial, and although it may be very true that a wide distinction should in some respects be made between Merchant Vessels and Ships of War belonging to a Sovereign State, especially in regard to the Crew, and to the Freedom of the Vessels from arrest by the Municipal Laws of the Country (see Case of 'The Exchange', 7th Cranch's Reports, p. 116, and 'Prins Frederick', 2 Dodson's Admiralty Reports, p. 451), I think that such distinction can scarcely be said to extend so far as to justify a refusal to deliver up Criminals seeking to avoid the pursuit of Justice. The General Rule of Law is that every Sovereign state has a right to punish offences committed within its own Territory when the Criminal can be found within such Territory.

I have the honour to be &c.,
J. DODSON

To the Rt. Hon. the Viscount Palmerston.

3. *Asylum on diplomatic and consular premises*

In a Report of 22 December 1865,¹ with regard to an insurrection in Haiti, Phillimore said:

The next error seems to have been the notion that the [British] Consul was entitled to receive and protect Refugees in his house. . . .

He regarded this action as one incident in the course of an 'active intervention on behalf of the Government of Hayti in this civil war, at variance with the policy which Her Majesty's Government had determined to adopt'.

In another Report of the same date upon the same incident, Phillimore drew attention to the 'distinction between the house of the Consulate and of the Embassy with respect to the question of an asylum', and stated that 'by long usage, as well as by direct concession, the Consular residence may have acquired privileges in this matter which are usually incident only to the house of the Embassy'.

On 12 March 1866 (Haiti)² Phillimore reported:

That it appears from the answers of the foreign Consuls to Her Majesty's Chargé d'Affaires in Hayti, that the Government of that country has been in the habit of granting to the Consular houses the privilege of protecting refugees. This, as the American Consul justly observes, is an exceptional privilege not in accordance with the general law of nations. The present Government of Hayti appear to desire the continuance of this privilege, because it spares the Government the necessity of inflicting capital punishment on political offenders, which they are obliged to decree, but do not wish to execute. Her Majesty's Chargé d'Affaires says that the exercise of the privilege has saved a great many lives, but 'that it involves our Vice-Consuls not only in great

¹ F.O. 83. 2290: Haiti.

² In substance, repeated on 26 January and 7 May 1867 (San Domingo).

expenses, but exposes them to serious disputes with the local authorities'. He is of opinion, however, that if it is to be abandoned, due notice should be given at a time when the Republic is tranquil, of the intention to abandon it.

I think the existence of the privilege at this moment is made out, but I should also think that it ought, as soon as a proper time arrives, to be abandoned.

There is a Report by Coleridge, Jessel, and Deane of 7 April 1873 (Haiti) relating to three Dominican refugees who were seized by the Dominican authorities in the private residence of the British Vice-Consul at Porto Plata (which was distinct from the Vice-Consulate), in which they reported that:

Her Majesty's Government cannot properly instruct [the British Minister] to insist on the surrender of the refugees, or any reparation to the British flag, which last was not insulted:

but they recommended a conciliatory attempt to secure the release of the three prisoners and a salute to the British flag.

On 15 December 1883 (Haiti), in the course of a civil war in Haiti, James, Herschell, and Deane, reporting on a complaint by the Government of Haiti of 'the abusive exercise of the right of asylum by foreign Legations', approved the following passage in the draft of a dispatch:

As regards the right of asylum, Her Majesty's Government are not aware that its exercise by Her Majesty's Legation and Consulates in Haiti has been carried beyond the limits prescribed by humanity, and as President Salomon admits the propriety of its exercise to that extent, I have no further observations to offer upon that part of the Circular.

On 8 October 1896 (Africa) Webster and Finlay reported upon an incident arising out of the grant of asylum by the German Consul at Zanzibar to one Khaled (an Arab whose nationality does not appear), after he and a band of supporters had failed in an attempt to seize the Sultan's palace by force. Great Britain was the Protecting Power. The German Government claimed that by virtue of a treaty between Germany and Zanzibar conferring extra-territoriality upon German subjects, the German Consulate was in effect German soil. It was not claimed that Khaled possessed German nationality.

Webster and Finlay, after denying that the treaty did more than confer personal rights upon German subjects in Zanzibar, proceeded to deal with the question of asylum as follows:

The proposition that, as Consul, the German Consul can grant an asylum to alleged criminals whether political or ordinary, cannot, in our opinion, be sustained. It is true that such a privilege has been exercised by Diplomatic Representatives in Spain and in South America, and by Consuls in Persia, but there is, in our opinion, no doubt that this right of asylum, even in the case of Ambassadors, can be properly conferred only by the consent of the countries to whom they are accredited. It is in no way necessary

for the discharge of an Ambassador's duty that his house should be an asylum for persons charged with crime of any description, and no such privilege can be asserted by an Ambassador, still less by a Consul. There is nothing in the Treaty with Germany to confer such a privilege. . . .

The general conclusion to be drawn from the preceding Reports is that the United Kingdom Government recognizes no legal right to grant asylum upon diplomatic or consular premises or public ships¹ and no legal right to demand it, but on humanitarian grounds it has frequently authorized its diplomatic and other officers to grant temporary asylum in cases of emergency.

¹ See statement by Lord Chancellor Simon in the House of Lords on 7 October 1942, cited by Morgenstern in this *Year Book*, 26 (1949), p. 345. The position of fugitive slaves will be dealt with elsewhere.

SECURED AND UNSECURED DEBTS IN THE LAW OF STATE SUCCESSION

By D. P. O'CONNELL, LL.M., PH.D. (Cantab.)

THE present article is complementary to that which appeared in this *Year Book* for 1950¹ and in which an investigation was made as to the application of the doctrine of acquired rights to the problem of economic concessions in territory transferred from one state to another. It is proposed here to examine this doctrine in relation to the rights of creditors of the public debt of a state which has been either totally or partially extinguished. There has been controversy concerning the exact limits of the concept of acquired right, as well as the interests which may legitimately be brought within the definition, but the principle that international law guarantees and protects any mixed rights is generally admitted.² The rights of creditors of the public debt are no less private than other rights, and no less subject to the protection of international law.³ In order to establish that such rights impose on a successor state correlative duties it is not necessary to prove a transmission of the debtor's obligation from the predecessor to the successor state,⁴ or to contend for the theory that a state debt is a

¹ 'Economic Concessions in the Law of State Succession.' In this article the following abbreviations are used: *A.J.*—*American Journal of International Law*; *Hague Recueil*—*Recueil des cours, Académie de Droit International de la Haye*; *Rev. gén. de droit int. pub.*—*Revue générale de droit international public*; *Parl. Pap.*—*Parliamentary Papers*; *F.O.*—Documents indexed under *F.O.* in the Public Records Office and documents in the Foreign Office archives; *H.C. Deb.*—*Parliamentary Debates (Hansard)* *H.C. Official Report*; *M.R.*—*Recueil de traités, &c.*, edited by G. F. de Martens; *M.N.R.G.*—*Recueil général de traités, &c.*, edited by a number of editors in continuation of the work of M. de Martens.

² Fiore, *Nouveau droit international public* (1868), vol. i, p. 312; Calvo, *Le Droit international théorique et pratique précédé d'un exposé historique des progrès de la Science du droit des gens* (5th ed., 1896), vol. iii, p. 399; Despagnet, *Cours de droit international public* (4th ed., 1910), p. 122; Gidel, *Des effets de l'Annexion sur les Concessions* (1904), pp. 81–91. See also the decisions of the French Cour de Cassation in Dalloz, *Jurisprudence générale, recueil périodique et critique fondé par MM. Dalloz* (1862), vol. i, p. 355, and *ibid.* (1866), vol. i, p. 374. Dr. Strupp strenuously denies that there exists any international law protection whatever for private rights because of the absolute character of sovereign jurisdiction: see *Hague Recueil*, 47 (1934), p. 478. See also Kaeckenbeeck in this *Year Book*, 17 (1936), p. 8; *Hague Recueil*, 59 (1937), p. 340.

³ These rights are actually of a mixed public and private character similar to the rights of a concessionaire in a public concession. The private-law aspects of a concessionaire's rights were discussed in the article quoted, and the conclusions there arrived at apply equally to the rights of creditors.

⁴ This is the theory, based on analogy from succession in Roman law, adhered to by earlier writers, in particular Despagnet, *op. cit.*, p. 120; Fauchille, *Traité de droit international public* (forming the 8th edition of H. Bonfils, *Manuel de droit international public*), vol. i, Pt. I, p. 380; Fiore, *op. cit.*, vol. i, p. 316; Martens, *Traité de droit international* (translated from the Russian by Léo), vol. i (1883), p. 369; Rivier, *Principes du droit des gens* (1896), vol. i, p. 70; Spiropoulos, *Traité théorique et pratique de droit international public* (1933), p. 75; Piédelièvre, *Précis de droit international public du droit des gens* (1894), vol. i, pp. 169–70; Kiatibian, *Conséquences juridiques des transformations territoriales des États sur les traités* (1898), p. 23; Bustamente y Sirven, *Droit*

real and transitory obligation which impresses a territory irrespective of changes of sovereignty.¹ For a legal bond to be created between the successor state and the predecessor's creditor it is sufficient that the latter's acquired rights are prejudiced by the change.

The extent to which such rights are prejudiced differs according to whether the debt is (i) unsecured, or (ii) secured, and according to whether the debtor state is (a) totally extinguished, or (b) partially extinguished. It is therefore necessary to divide the discussion under these several categories. On the distinction between secured and unsecured debts some light is cast by Opinions of the Law Officers of the Crown which have recently become available for publication. The precedents principally to be cited in this article are those to which these Opinions relate, and some others which have not hitherto been completely examined.

I. *The unsecured debt*

The general public or national debt is that contracted by the central government in the interest of the entire state. It is usually created by an issue of paper securities and is rarely guaranteed by a pledge or mortgage of state assets. It is therefore governed by ordinary contract law, and the debt relationship is personal to the creditors on the one hand, and the debtor state on the other.² Such relationship, however, is more than a mere *vinculum juris*; it also gives rise to a certain state of facts. When a state borrows money two things are created. There is, first, the juridical link between the parties, which exists until either the money is repaid or the state itself has disappeared. There is, secondly, the factual situation which consists in the actual detention by the state of money in which the lender has an equitable interest. When the debtor state is superseded, the legal duty to repay this money is not inherited *ipso jure* by its successor. What is 'inherited' is the state of facts to which the now extinguished legal relationship has given rise. The equitable interest which the lender has in this factual situation is an acquired right which the successor state must respect. The latter becomes invested, not with the legal obligations of its predecessor,

international public (translated from the Spanish by Génie, 1936), vol. iii, p. 339; Kelsen in *Hague Recueil*, 44 (1933), p. 755; Szaszy in *Revue de droit international*, 5 (1930), p. 588; Sausser-Hall in *Schweizerische Juristen Zeitung*, 35^e année (1938), n. 11, pp. 161-5; Sédillot in *L'Europe nouvelle*, 18 April 1939, 22^e année, n. 1101, pp. 287-8; Cavaglieri in *Hague Recueil*, 26 (1929), p. 380.

¹ This is the theory propounded by Sack, *Les Effets des transformations des états sur leurs dettes publiques et autres obligations financières* (1927), pp. 54 and 88. See also the same author in *Hague Recueil*, 23 (1928), pp. 228, 237. Cavaglieri suggests that the successor state takes over debts of which the predecessor was 'grevé au profit de ses créanciers étrangers', in *Annuaire de l'Institut de droit international*, 34 (1934), p. 479; Calvo, op. cit., vol. iv, p. 404.

² Feilchenfeld, *Public Debts and State Succession* (1931), p. 648; Hall, *International Law* (8th ed., revised by Pearce Higgins, 1926), p. 114; Jèze, *Le Partage des dettes publiques au cas de démembrement de territoire* (1921), p. 17.

but with a new obligation, the obligation not unjustifiably to enrich itself at the expense of private investors who have an equitable interest in the debt. It is not an obligation derived from the predecessor state, but one imposed *ab exteriore* by international law, and it arises when the successor, through its own action in extending its sovereignty, becomes competent to destroy the titleholders' interest.

(a) *Total succession*

When a debtor state is totally absorbed in another its international capacity for rights and obligations, though not necessarily its fiscal capacity, is extinguished with it. In the act of change of sovereignty the successor state acquires the competence to destroy the investment of the creditors. It is not obliged to maintain the debt relationship in its exact terms, but it must satisfy the equitable interests which arise.¹ It is immaterial in which way this satisfaction is achieved. Should the successor state permit the absorbed state to preserve a financial and economic autonomy, it is the fiscal unit which is enriched by the invested capital, and it is out of the revenues of the unit that restitution must be made.² The most that the successor state must do is provide the means in its own municipal law for the creditor to enforce his rights. Should it fail to do so, or should it absorb the predecessor entirely within its own fiscal system, then it is the state as a whole which is enriched, and it is the state itself which must respect the creditors' interests.³ This it may do either by continuing to repay the debt and interest on the terms stipulated, thereby making an express or tacit novation of the debt relationship, or by paying off the capital up to the date of absorption.

In most historical instances the absorbed state has been permitted to

¹ Jèze contends that 'absolute respect for the rights of creditors is the rule' (op. cit., p. 8); Sack argues that 'the principle of succession to debts of a state rests on that of the safeguard of acquired rights of private persons. Persons possessing movable or immovable goods having rights *in rem* or rights of credit, preserve these rights notwithstanding the eventual change of sovereignty over the territory in question. The new government, though it be sovereign and independent, must recognize and respect the rights which have been acquired' (op. cit., pp. 59-60, also pp. 61 and 74). See also Fitzmaurice in *Hague Recueil*, 73 (1948), p. 288; and Feilchenfeld, who analyses the weaknesses of debts as a species of private property (op. cit., p. 655).

² Sack admits that the absorbed territory can preserve its character as an autonomous region (op. cit., p. 155). Appleton argues that though the state may be dead in international law it is not dead in administrative law; it exists under the form of a province and still retains its debts (*Des effets des annexions de territoires sur les dettes de l'État, démembré ou annexé, et sur celles des provinces, départements, etc., annexés* (1895), p. 36). Gidel replies that this is interesting only as a matter of machinery of repartition; the absorbed state cannot remain a debtor since its international personality has been destroyed (op. cit., p. 70). See Jèze, op. cit., p. 19; Garner in *A.J.* 32 (1938), p. 430.

³ Sack accepts the doctrine of unjustified enrichment in this context, pointing out that the debt has been used to construct things of benefit to the inhabitants, and concluding that 'one must not be enriched at another's expense' (op. cit., p. 12). The only principle which Dr. Feilchenfeld admits is that 'maintenance of financial obligations must not be impaired' (op. cit., p. 222).

discharge its own debts. Thus when Fiji was annexed by Great Britain in 1874 its debts were discharged out of its own revenues, and not those of the United Kingdom.¹ Hawaii's debt was assumed by the United States in 1898, but federal revenues were to be applied to its liquidation to only a limited amount, the balance being a charge on the budget of the islands.² When France annexed Tahiti the latter ceased to have any fiscal autonomy, and France provided for the servicing of its debt.³ On the other hand, when a French Protectorate was declared over Tunis the latter did preserve such autonomy, and the view was taken that France incurred no financial liability. A similar attitude was adopted towards the debt of Madagascar in 1896.⁴ When Great Britain annexed the Boer Republics in 1900 the Law Officers were clearly of the opinion that there was no obligation on the part of Great Britain to do more than leave the annexed states competent to discharge their own debts. They advised that:

'Her Majesty's Government, as successor to the Governments of the South African Republic and the Orange Free State, are bound to take over the public debts of these States as a charge thereon, but not, of course, as debts payable other than from revenue derived from the conquered States respectively . . . Her Majesty's Government are bound to pay any instalments of principal and interest which may be due in so far as they have revenue from the conquered territory for that purpose.'⁵

The annexation of Austria in 1938 gave rise to the most important controversy on this issue. The correspondence on the subject is not, however, instructive in drawing a distinction between the case where the fiscal competence of the debtor state is preserved, and that where it is destroyed. The United States, in a Note to Germany, asserted that according to international law 'the substituted sovereignty assumes the debts and obligations of the absorbed state',⁶ while Great Britain, along with the other guarantor states⁷ of the Austrian debt, 'assumed that the German Government accepted full responsibility for all financial liabilities of the former Austrian Government in respect of its external indebtedness'.⁸ The German Government, on the other hand, sought to remove the case of Austria from the ordinary law of state succession on the ground of the 'political character' of the Austrian debts, and while undertaking the service of bonds on these

¹ Letter from the Colonial Secretary to the Governor of Fiji of 4 March 1875 (*Parl. Pap.*, 1875, vol. lli (c. 1337), p. 237).

² Moore, *Digest of International Law issued by Presidents and Secretaries of State of the United States of America, Opinions and Decisions of Courts Federal and State* (1906), vol. i, p. 351.

³ *M.N.R.G.*, 2nd Ser., vol. ix, p. 223.

⁴ *Rev. gén. de droit int. pub.* 4 (1897), p. 231, n. 2, Article 6.

⁵ Opinion of 30 November 1900: *F.O. Confidential Papers* (7516), No. 22 A.

⁶ Hackworth, *Digest of International Law*, vol. i (1940), p. 543.

⁷ 337 *H.C. Deb.*, 5 s., c. 34.

⁸ 336 *H.C. Deb.*, 5 s., c. 6.

loans issued to British holders,¹ denied in a Note to the United States that there was 'any obligation on the part of the Reich to acknowledge the legal responsibility for Austria's Federal debts'.²

The case of federation of a state, or the formation of a real or personal union, is only a particular application of the rules above suggested. Everything depends on the extent to which the fiscal autonomy of the federating state is preserved. Different principles prevail, however, when the entire territory of a state is divided up among several successors. Here there can be no question of the successor states preserving the financial competence of the debtor since the latter's fiscal composition is destroyed. It follows, therefore, that the several successor states, in the act of destroying this composition, render themselves responsible for the equitable consequences of their predecessor's financial engagements. While they cannot be compelled to continue the terms of the loans they must not unjustifiably enrich themselves, and this implies that they must at least effect restitution.³ Such a principle can only be very general in its scope, and its application is always attended with the gravest difficulties. There is little agreement among writers as to whether the several successor states must undertake portions of the debt on a basis proportionate to economic wealth, actual or potential revenue, or extent of territory and population.⁴ The most that emerges from a consideration of all the possible tests is that the distributive key must be related to what Sack calls the 'contributive force' of each part of the dismembered territory.⁵ This contributive force can only be realized by a consideration of all the possibly influential factors.⁶ No one basis of distribution is more mandatory than another, and once it is established that international law compels a repartition, the interested states must thereupon evolve the most satisfactory means to secure recognition of the acquired rights of the creditors. The latter, in such a case, will naturally wish to know against which state they must pursue their claims. There is, however, little authority as to whether the successor states are jointly or severally liable, and very few writers appear to have considered the matter relevant. In view of the difficulties attending the apportionment of the debt it seems impossible to avoid a conclusion in favour of joint responsibility.

¹ 337 *H.C. Deb.*, 5 s., c. 2362.

² *The Times* newspaper, 17 June 1938, p. 16, col. 23; Garner, loc. cit.; Hyde, *International Law chiefly as interpreted and applied by the United States* (2nd ed., 1945), vol. i, p. 419; *Documents on International Affairs published under the auspices of the Royal Institute of International Affairs*, 1938, vol. ii, pp. 100-1.

³ Feilchenfeld, op. cit., p. 679; Sack, op. cit., pp. 205 and 207.

⁴ Wheaton, *Elements of International Law* (3rd ed., 1889), p. 52; Despagnet, op. cit., p. 123; Piédelièvre, op. cit., vol. i, p. 132; Pradier-Fodéré, *Traité de droit international public européen et américain*, vol. i (1885), p. 279; Seloise, *Traité de l'annexion au territoire français et de son démembrement* (1880), p. 170; Huber, *Die Staatensuccession. Völkerrechtliche und Staatsrechtliche Praxis im XIX Jahrhundert* (1890), p. 91.

⁵ Op. cit., p. 528.

⁶ *Ibid.*, p. 534.

(b) *Partial succession*

Where only part of the debtor state is absorbed, both its international personality and its fiscal capacity remain, although the actual ability to liquidate the debt may be severely circumscribed by a substantial loss of revenues and assets. The successor state in this case does not become competent to interfere with the formal debt relationship, and the rights of the creditors against the debtor remain, in law, completely undisturbed, though they may, in fact, be rendered considerably precarious.¹ The successor state, in taking over the product of the creditor's investment, is, it is true, enriched. It is so enriched, however, not at the expense of the creditor, but at that of the debtor state. It is not, therefore, 'unjustifiably' enriched, and is not directly subject to the operation of the doctrine of acquired rights. While there may be justice in a repartition of the debt between the two states,² such repartition is demanded by no fundamental principles of jurisprudence and is not substantiated by the body of state practice. It is in seeking to establish such a transmission of the debt to the successor state that theorists have discredited the concept of state succession. Their failure consists in commencing from the point of view of protecting the interests of the predecessor state, when the interests really demanding protection are those of the latter's creditors.

As it happens, however, a substantial loss of territory frequently renders a debtor state incompetent to raise revenues for the amortization of its debts. In such a case the successor state, while incurring no liability in strict law, may be disposed to accept the obligations of portions of such debts. There are historical precedents for such action too numerous to mention.³ In each case it seems to have been the interests of the creditors rather than the possibility of bankrupting the predecessor state that have been paramount in the decision to undertake such debts. Lord Salisbury at the Congress of Berlin in 1878, for example, regarded the Roumanian

¹ Martens, op. cit., vol. i, p. 370; Piédelièvre, op. cit., p. 122; Hall, op. cit., p. 116, n. 1; Fitzmaurice, loc. cit., p. 289.

² The obligation of repartition has been asserted by a considerable number of writers: Despagnet, op. cit., p. 132; Fiore, op. cit., vol. i, p. 360; Rivier, op. cit., p. 70; Calvo, op. cit., p. 249; Szaszy, loc. cit., p. 587; De Louter, *Le Droit international public positif* (1928), vol. i, p. 228; Podesta Costa, *Manual de derecho internacional público* (1947), p. 82; Huber, op. cit., p. 88. Appleton's view is that the debtor itself is divided while the ceded area, which was a debtor before the cession, has merely changed its status, and he supports this theory by analogy with the *capitis diminutio* of Roman law (op. cit., p. 150). See, to the contrary, Pradier-Fodéré, who bases his denial on the precedent of Alsace-Lorraine in 1871 (op. cit., vol. i, p. 274); Hall, op. cit., p. 116, n. 2; Oppenheim, *International Law* (7th ed., 1948), vol. i, p. 160; Keith, *The Theory of State Succession with special reference to English and Colonial Law* (1907), p. 60; Udina in *Hague Recueil*, 44 (1933), pp. 755-6; Hackworth, op. cit., vol. i, p. 540.

³ See, for example, Treaties of Kiel, 1814 (*M.R. Supplement*, vol. v, p. 666, Article 5); Rio de Janeiro (ibid., vol. x, Part 2, p. 799, Articles 1 and 2); Turin, 1859 (*M.N.R.G.*, vol. xvi, Part 2, p. 539, Article 4; *M.N.R.G.*, vol. xvii, Part 2, p. 22, Article 2); Zürich, 1859 (ibid., p. 516, Article 4); Vienna, 1864 (ibid., p. 470, Article 3).

and Serbian tributes to the Sultan as part of the security of the Ottoman creditors, 'a pledge which should not be taken away from them'.¹ Likewise, the Armistice Conference convened at Paris at the end of the First Balkan War in 1913 adopted the formula that 'every cession of territory stipulated for in the present treaty implies (*comportera*) for the cessionary state the obligation to respect the rights' which the Ottoman Government had constituted 'for the benefit of third parties'.²

The peace treaties at the end of the First World War adopted the general principle that the successor states of the dismembered Central Powers and the Ottoman Empire should 'pay a portion' of the debts of the latter states, such portion to be determined by the Reparations Commission.³ So many exceptions were created to this principle, however, as to destroy any assumption that the principle was formulated on a strictly legal basis.⁴ The Ottoman Debt Arbitration would to this extent appear to have proceeded along correct lines, and the arbitrator's assertion that it is impossible to say that the state which acquires territory by cession is in strict law bound to take over a corresponding part of the public debt of the ceding state⁵ may be accepted as basically sound. It has been criticized only by those writers who found the argument for a repartition on the interests only of the predecessor state and not those of the creditors.

II. Secured debts

A consideration of the problems of the law of state succession from the point of view of the interests of the creditors renders fundamental the distinction between secured and unsecured debts. An unsecured debt is merely a right to receive payment of money at a fixed date, a right which can be pursued against the debtor only, and not by a transfer of the debtor's assets. A secured debt, however, is one for which liquidation is provided from predetermined assets or revenues. It is said to be charged or pledged on such assets and revenues, and the creditors may be given the right to pursue the debt against them. In other words, there is some ground for contending that, while an unsecured debt is a purely incorporeal right, a secured debt is a corporeal one to the extent to which the creditors acquire equitable property in state assets.

Security for a debt may take one of two forms. In the first place, there

¹ *British and Foreign State Papers*, vol. lxix (1878), p. 1066.

² F.O. 3575/1/13/44; Gooch and Temperley, *British Documents on the Origins of the War, 1898-1914* (1926), vol. ix, Part 1, p. 435.

³ *British Treaty Series*, 1919, No. 4. (Cmd. 153), Article 254 at p. 124.

⁴ See *Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace* (Parl. Pap. 1919, vol. liii (Cmd. 2580), p. 11). See on the subject Feilchenfeld, *op. cit.*, p. 440.

⁵ *Répartition des annuités de la Dette Publique Ottomane, Sentence Arbitrale rendue par Eugène Borel* (1925), pp. 66-67.

may be a real mortgage, pledge, or lien of tangible state property. In the second place, there may be security only in the sense that certain revenues or certain funds are allocated to the amortization of specified loans. These two types of debt securities are not often distinguished either in state practice or by publicists. In fact the whole concept of debt security is controversial, and there is little authority concerning the extent to which the category of mortgage in private law can be carried over without modification into international law.

(a) *Pledged assets*

The true character of a debt pledge has never been adequately explored. It is not certain if a creditor acquires over state assets a true equitable right of property, nor is it certain that the assets retain their pledged character after their ownership has passed to a successor state. If the creditor has a real property right in the mortgaged assets then it would seem that the successor state must treat this as a fact giving rise to a legal duty. The former's interest in this case is different from that of the creditor of an unsecured debt. The latter possesses merely a right *in personam* which subsists against a state losing part only of its territory, and which expires with a debtor that is totally absorbed or dismembered. The creditor of a secured debt, however, may very well possess a right *in rem* against public property, and in such a case the predecessor and the successor may be jointly liable to him, the one on a contractual basis, arising out of the right *in personam*, the other on a basis of restitution arising out of the right *in rem*. State practice is not, however, sufficiently extensive to give approbation to this proposition, and such of it as exists is so unsatisfactory as to have been very largely ignored by publicists.¹ The hitherto unpublished Opinions of Law Officers are virtually the only substantial authorities on the subject.

(i) *Cession of the province of Tarapacá by Peru to Chile, 1883.* The nature of a pledge was examined to some extent in a controversy with Chile respecting the cession of Peruvian territory to that country in 1883. Peru had pledged guano deposits in the province of Tarapacá, and the proceeds of those deposits, as security for certain national loans. In 1882 Chile,

¹ Wolff seeks to demonstrate that a mortgage in the international sense is not the same as a mortgage in the civil sense because there can be no right of sale (in *Hague Recueil*, 36 (1931), p. 547). Sack doubts whether mortgages are always binding on the successor state seeing that this might prejudice the interests of the latter's creditors (op. cit., pp. 201 ff.). Udina says that as to debts called 'hypothecated' debts, that is to say, of which the payment is guaranteed by immovables, customs, monopolies, or revenues given in mortgage, one can affirm a succession in the case of diminution of the territory of the debtor only when they are at the same time debts localized in the detached territory, or further, perhaps, if the acquiring state is invested with the mortgaged assets (in *Hague Recueil*, 44 (1933), p. 756). Jèze believes that the assets retain their mortgaged character after cession (op. cit., p. 19).

being then in military occupation of the province, decreed the sale of the guano, half of the proceeds to remain with Chile, the other half to be deposited in the Bank of England for distribution among the creditors of Peru, whose rights should be recognized as guaranteed by the guano. When the Treaty of Ancón¹ in the following year transferred the province to Chile, this provision was incorporated in it. Various creditors protested against the limitation of their rights to only half the guano proceeds, and Notes were sent by several of the Powers, notably Great Britain, the United States, Italy, France, and Spain. Chile insisted that the rights of the bondholders lay in the Chilean courts, but expressed her willingness to enter into an equitable understanding with them. The Secretary of State instructed the American Ambassador to Chile as follows: 'Chile, in taking possession at the close of the war with Peru, of the guano deposits belonging to Peru, took them subject only to such liens as were binding under Peruvian law at the time of cession.'²

On 5 November 1884 the Law Officers advised the Foreign Office that they did not consider it necessary to examine critically all the propositions of the Chilean reply because the Chilean Government 'declare that they will not refuse to enter into an equitable understanding with the creditors of Peru, who may have rights that merit consideration, and which have originated in acts and contracts legally established, and this declaration is in addition to an admission that if there be creditors who have the rights of mortgagees in respect of the property ceded to Chile, they are still entitled to enforce those rights'.³ It was further stated, however, that a passage in the Chilean reply which referred to creditors other than pretended mortgagees 'appears to us to be an undertaking on the part of the Government, independent of the decision of any Tribunal, or of strict legal right'. The Law Officers were thus, apparently, of the opinion that in general creditors have no rights against a partial successor unless these rights be those of mortgagees of state assets. This distinction is clearly explicit in an Opinion delivered by the same Officers on 22 January 1884. The reference to them stated that the case 'appears to raise a question of international right with regard to the obligation of a State acquiring new territory by conquest or cession to respect the private rights of property therein, and to assume the obligation of discharging the public debts charged on such territory'. The Law Officers advised as follows:

'Though it would be more equitable that when a part of the territory of one State is acquired by another by conquest, a part of the debt of the conquered country, if any exists, proportionate to the territory so acquired, should be taken over with it; yet there cannot be said to be any absolutely settled rule of international law to that effect.

¹ *M.N.R.G.*, 2nd ser., vol. x, p. 191, Article 2.

² Moore, *op. cit.*, vol. i, p. 336.

³ Opinion of 5 November 1884 (F.O., *Confidential Papers* (5121), No. 66).

An equitable apportionment of the debt has been frequently, but not invariably, provided for in Treaties of Peace. If, therefore, there were no special circumstances in the present case, it might be doubtful whether there was ground for intervention on the part of Her Majesty's Government.

'The circumstances which exist in the present case are, however, certainly peculiar. There can be no doubt that the money was lent by the bondholders, in reliance mainly on the security of the valuable guano deposits belonging to the Peruvian Government, and, as some of the most important of these deposits is included in the territory to be ceded, we think there is an equitable claim on the part of the bondholders of a special character which may justly be urged upon the consideration of the Government.'¹

On 2 February 1884 an Opinion was given that nitrate deposit holders were in the same position as the bond-holders, and the reference noted that Chile was prepared to deal with the question on rules of international law.² A draft Note to the French Government was drawn up by the Law Officers on 3 August 1886, in which it was observed that the British Government would unite with other governments in taking steps to clear up the controversy 'on a fair and equitable basis'. They were willing to take steps to have an arbitration, which implies that what was 'fair and equitable' was regarded as 'legal'. However, it was pointed out, 'the Chilean Government have not shown themselves unwilling to do justice in the matter, for they have already set apart for the bondholders large sums of money derived from the revenues of Tarapacá, thus admitting in principle the validity of the claim'. In the conclusion of the Note the rights of the creditors would appear to have been regarded as enforceable against Chile. 'Her Majesty's Government are ready to support by diplomatic means the reasonable claims of the creditors on the revenues of Tarapacá to the fullest extent that is warranted by justice and International Law.'³

In due course Chile abandoned her claim to the half of the deposits, and her rights to sell them, and eventually the dispute developed around the problem of distribution of the proceeds among the creditors. An arbitral tribunal was set up to settle this question. Before the tribunal Chile denied that there was any mortgage of the assets in Peruvian law, and the award, delivered in 1901, was in favour of this contention. It decided that the rights of the creditors depended upon the existence of civil mortgages, but that no such mortgages had been established. Under Peruvian law the creditors had not acquired any security that was transmissible, and the relationship between them and Peru was solely one of contract. The controversy did not, therefore, establish with certainty the legal character of a debt pledge, but it did not exclude the possibility of debt pledges constituting mortgages of municipal law.⁴

¹ F.O., *Confidential Papers* (5120), No. 65.

² Ibid. (5721), No. 84.

³ Ibid. (5440), No. 8.

⁴ Feilchenfeld, *op. cit.*, p. 328, nn. 28 and 29.

(ii) *Decision of the Reichsgericht, 1885*. In 1885 the German Reichsgericht stated that 'all incumbrances of a public character resting on a piece of property in so far as they are not owed to the State itself, continue to subsist in spite of the incorporation of the property in another State'.¹

(iii) *Secured debts in the Peace Treaties, 1919*. The Treaties of St. Germain and Trianon distinguished secured debts as those 'specifically secured' on 'railways, salt mines or other property'. Property so pledged to secure a debt was to remain pledged.² The same Treaties also dealt with the problem that arises when the security is divided among several successor states. As a general principle it would seem that a successor state which takes the security intact should be responsible for the debt attached to it, while the debt attached to a dismembered security should be divided among the several successors in proportion to the value of each part of the security. This in effect was the solution adopted in the Treaties.³

(b) *Pledged revenues*

If a portion of the national debt is charged to a local revenue merely because the latter offers a convenient basis of credit, it would seem that such pledge need not be respected by a successor state. It is difficult to agree that a revenue pledge is a mortgage in the same sense as hypothecated assets. There can at the most be only a right to repayment out of such revenues, and there is no authority for the proposition that a creditor can foreclose on them or possess equitable property in them. The real nature of a revenue pledge, however, is not sufficiently determined for the subject to be treated with any degree of assurance.⁴

(i) *The incorporation of Texas in the United States, 1845: the Texan Bonds Arbitration*. During the controversy between Great Britain and the United States with respect to the obligation of the latter to undertake the servicing of the secured debt of Texas, both the British Agent⁵ and the Attorney-General of the United States⁶ were of the opinion that revenue pledges are tantamount to mortgages. The American Agent, however,

¹ *R.G.S.* 13, 8, 204; *Fontes Juris Gentium*, Ser. A, sec. II, vol. i, p. 114.

² St. Germain, *British Treaty Series*, 1919, No. 11 (Cmd. 400), Article 203, at p. 55; Trianon, *British Treaty Series*, 1920, No. 10 (Cmd. 8960), Article 186, at p. 51.

³ When divided among several successor states, that part of the Austrian debt situated in a particular state was to constitute the security only for that portion of the debt which was apportioned to the state, and not for any other part of the debt. The amount of the liability in respect of such secured debts was to be deducted from the amount payable by the successor state to Austria for Austrian property transferred with the cession of territory.

⁴ On 5 July 1825 the King's Advocate gave an Opinion on the obligation of Mexico to undertake payments of certain ecclesiastical annuities to the late Cardinal of York. The Spanish Government had pledged these annuities on the Mexican revenues. The King's Advocate was doubtful of the legal character of the pledge, but in any event Mexico would not be responsible for such a debt (F.O. 83/2289).

⁵ See Feilchenfeld, *op. cit.*, p. 282.

⁶ *Opinions of the Attorneys General of the United States*, vol. vi, p. 146.

rejected this view, and argued that Texas could still borrow money on pledged revenues. The American Commissioner observed in addition that the pledging of a revenue could give no rights of control over it to a creditor.¹

(ii) *Projected transfer of a province by Mexico to the United States, 1886.* On 11 July 1866 the Queen's Advocate advised that 'if part of the Mexican territory, the revenues of which are already pledged or hypothecated to the British bondholders, be sold without their consent, it will still be liable to discharge its due share of the interest or principal of the debt to the bondholders. Care should be taken that the purchaser be duly affected, previously to the purchase, with the knowledge of the lien which the foreign creditor has upon the territory in question'.²

(iii) *Cession of Cuba by Spain, 1898: the Cuban Debt controversy.* The only substantial authority on revenue pledges is that afforded by the controversy between the United States and Spain during the negotiations preliminary to the Treaty of Paris, 1898, relative to the loans charged on the Cuban revenues. Spain argued that the debts were contracted by it as sovereign of Cuba, and being charged on the Cuban revenues were locally connected. The principles of repartition, the Spanish Commissioners argued,

'seem to be observed by all cultured nations that are unwilling to trample upon the eternal principles of justice, including those in which such cessions were made by force of arms, and as a reward for victories through treaties relating to territorial cessions. . . . When creditors have been granted by the very certificate of their contract a direct lien on certain defined property or certain defined income, in order thus to recover the loaned capital and its legitimate interest, the sovereign cannot then, without first reckoning with their consent, cede or freely dispose of such property and incomes as if they were his full and exclusive property. . . . The Spanish Commissioners only wish that the principles up to this time always admitted, to wit, that a debt being exclusively the debt of a colony and affecting its territory goes with the colony itself, be also recognised in this Treaty.'³

The American Commissioners replied that 'as to that part of the Spanish Memorandum in which the so-called Cuban bonds are treated as "mortgage bonds" and the rights of the holders as "mortgage rights," it is necessary to say only that the legal difference between the pledge of revenues yet to be derived from taxation and a mortgage of property cannot be confused by calling the two things by the same name'.⁴ In addition to

¹ Feilchenfeld, *op. cit.*, p. 283.

² F.O. 83/225.

³ Moore, *op. cit.*, vol. i, pp. 353, 362 ff. There was never any question of transferring a proportionate part of the whole Spanish public debt, but only that part of it locally assigned (*ibid.*, p. 353). 'From no point of view can the debts above described be considered as local debts of Cuba, or as debts incurred for the benefit of Cuba,' said the United States Commissioner. 'They are debts created by Spain for its own purposes, and through its own agents, in whose creation Cuba had no voice' (*ibid.*, p. 358).

⁴ *Ibid.*, p. 383.

describing the debts as 'odious' because imposed on the Cuban people without their consent, the United States imported a doctrine of 'the national character' of debts.¹ Spain pointed out that Cuba should remain charged because the Cuban revenues constituted a first pledge, and Spain was a party to the debt only as guarantor.² The United States, however, held that Spain was the sole debtor, and that the debt was part of Spain's national debt and protected by two securities, the principal one of the Cuban revenues, and the ancillary one of Spain's guarantee.³

(iv) *Pledged revenues in the Peace Treaties, 1919-23*. Germany in 1919 had no secured debt, and except for loans secured on the Egyptian tribute⁴ no distinction was made in the other Peace Treaties between loans secured by revenue pledges and unsecured loans. The system applied to Egypt was described in the Ottoman Debt Arbitration as a 'specialization of securities'.⁵ Turkey was released from all undertakings and obligations in regard to the Ottoman loans guaranteed on the Egyptian tribute.⁶

(c) *Debts of a fiscally autonomous region*

It is sometimes considered that debts contracted by a local agent of the central government, or by a provincial government, are secured in so far as their amortization is to be provided for entirely out of defined local revenues. In some respects, indeed, such 'local' debts are merely extensions of revenue pledges although the revenues in question are not specified to be charged in the instruments of credit. When a fiscally autonomous, but non-sovereign, territory is absorbed by another state the situation is analogous to that which arises in the case of total succession.⁷ The successor state is not bound to do more than either permit the debt relationship to subsist or reimburse the creditors if that relationship is destroyed. Debts of this kind have been assimilated historically to debts actually charged on territory. They emerged as a separate category in the eighteenth century designated as *dettes hypothéquées sur le sol* in many treaties of the Napoleonic era. It seems that at that time territory was treated as something which

¹ Moore, op. cit., vol. i, pp. 358, 367, 378, 381, 382.

² Ibid., p. 379.

³ Ibid., pp. 368 ff.

⁴ Treaty of Lausanne, *British Treaty Series*, 1923, No. 16 (Cmd. 1929), Article 18.

⁵ Loc. cit., p. 64.

⁶ For a thorough analysis of the Egyptian tribute see Sack, op. cit., pp. 109-23.

⁷ See Mosler, *Wirtschaftskonzessionen bei Änderungen der Staatshoheit* (1948), p. 187. See also Jèze, op. cit., p. 18; Westlake, *International Law*, Part I, p. 62; Redslob in *Revue de droit international*, 13 (1934), p. 482; François in *Hague Recueil*, 66 (1938), p. 61; Despagnet, op. cit., p. 123; Piédelièvre, op. cit., vol. i, p. 132; Appleton, op. cit., p. 156; Podesta Costa, op. cit., p. 81; Udina in *Hague Recueil*, 47 (1934), p. 490; Hyde, op. cit., vol. i, p. 409. Sack considers that regional debts do not bind the whole territory, but follow the provinces to which they are attached (*Hague Recueil*, 23 (1928), p. 265). Debts charged by the central government on an area he calls 'provincial debts', and those contracted for the exclusive benefit of the area he calls 'regional debts' (ibid., p. 263).

could be mortgaged in its entirety, and there is little doubt that the concept of local debt was indistinguishable from the concept of debt pledge. It was only after 1830 that local debts came to be regarded as debts owed by a local area as distinct from debts charged upon it.¹

As a matter of history local debts have always been either assumed by the successor state or retained by the territory if its fiscal composition was not impaired. In the Peace Treaties of 1919 debts of undivided local administrations were taken to pass to the successor states as a matter of course, while debts owed by such administrations and secured on local assets followed the security.² Since the Second World War there have been many instances of newly created states assuming liability for the debts of the local areas from which they were constituted. Indonesia undertook the amortization of the consolidated loans of the Netherlands Indies, the share of the Indies in the Netherlands National Consolidated Debt, the British Monetary Agreement, the Bretton Woods Accounts, and certain other international loans, and all internal debts of Indonesia outstanding at the date of the transfer sovereignty.³ The Philippines,⁴ and also the territories of the British Commonwealth which either became independent or attained Dominion status, or lost this status, were fiscally autonomous units, and all took over debts as a matter of course,⁵ with the exception of Israel which regarded herself as in a special position, being in no sense a successor of the Palestine administration. So long as Great Britain did not recognize Israel, even *de facto*, it was impossible to commence discussions on the latter's liabilities, and it was not until 4 July 1949 that negotiations opened in Tel Aviv. That a successor to a mandatory would normally be obliged to undertake the latter's financial responsibilities was never directly controverted. In fact, Article 28 of the Mandate itself indicated that the government which followed the mandatory administration should fully honour the obligations incurred during the period of the mandate. Great Britain insisted that international law imposed on Israel a direct responsibility, and sought to extract from that country an assurance that it accepted state succession in principle. The Resolution of the General Assembly of the United Nations of 29 November 1947,⁶ recommending the substitution

¹ See the following Treaties: Copenhagen, 1767 (*M.R.*, vol. i, p. 426, Article 2); Campo Formio (*ibid.*, vol. vii, p. 208, Article 4); Luneville, 1801 (*ibid.*, vol. viii, p. 538, Article 7); Vienna, 1807 (*M.R. (Supplement)*, vol. iv, p. 210, Article 5). See Feilchenfeld, *op. cit.*, pp. 175 ff.

² Treaties of St. Germain, Article 204: *loc. cit.*, p. 57; Trianon, Article 186: *loc. cit.*, p. 53.

³ Draft Financial and Economic Agreement, *Staatsblad*, No. J. 570, 21 December 1949, Article 25.

⁴ *United Nations Treaty Series*, vol. vii (1947), No. 1, p. 4, Article 4.

⁵ For the disposition of the debts of British India, Burma, Ceylon, and Newfoundland see the Note in this *Year Book* for 1949. At the time that Note was prepared the question of the debts of the Palestine Administration had not been settled. The case of Palestine is therefore included in this article to make the record complete.

⁶ U.N.Doc. A. 516.

of Israel in the debts of the Palestine administration, it was argued, was merely a recognition of the application to the case of Israel of this principle. Israel continued to maintain, however, that the law of state succession would not apply to the present case, and the legal arguments of the two delegations on this issue were so divergent that it was decided to discard them altogether. The negotiations were then removed to London, where an agreement was reached in March 1950, based entirely on compromise.¹

Administrative debts, again, are merely special types of local debts. There has never been any doubt that a successor state is under an obligation to respect those debts incurred in the ordinary routine of governmental administration in the territory acquired by it. Such debts approximate very closely to the obligations of administrative contracts. Just as in the case of such contracts, all legal relationship between the creditor or co-contractor and the debtor or contracting state disappears with the change of sovereignty, but the equitable interest of the former imposes on the new sovereign a correlative duty of non-enrichment.

Conclusions

It is now possible to formulate certain conclusions as to the obligations of a successor state with respect to the debts of its predecessor. Such conclusions can at the most be only very general guides, and it must always be recognized that economic considerations will inevitably obtrude themselves when the principles come to be applied in actual practice. Unless there be principles, however, and unless they can be accepted by states as fundamental determinants of financial problems, there cannot possibly be any satisfactory reconciliation of the equitable demands of creditors with the economic necessities of both predecessor and successor states.

State practice over a long period has been fairly consistently based upon the consideration that the interests paramously demanding protection by international law are those of private investors. Virtually the only occasions on which successor states have refused to undertake the servicing of the debts of totally absorbed states or provinces have been those when such debts were suspect as *obligationes odiosae*, and when the creditors were considered to have undertaken a risky investment giving rise to no equitable claims. Such instances are no more than derogations from the principles which follow, and do not challenge their validity:

I. THE UNSECURED DEBT

(a) *Total succession*

(i) If the debtor state is totally absorbed in another the contractual relationship between the debtor and the creditor is destroyed.

¹ *British Treaty Series*, 1950, No. 26 (2941), Article 4. Israel assumed responsibility for all bonds held and registered in Israel, provisionally assessed at £4,340,000.

(ii) In the act of destroying this relationship the successor state incurs a duty in international law to respect the equitable interests which the creditor possesses in the debt.

(iii) This duty of respect may be discharged either:

(a) by permitting the absorbed state to remain a fiscal unit discharging its own debts, provided that the creditor is afforded remedies in its own municipal law, or

(β) by the successor state itself paying off the invested capital.

(iv) If the debtor state is totally divided among several states it is suggested that the latter incur a joint and several liability to the creditors to discharge the debt.

(b) *Partial succession*

(i) If the debtor state merely loses a portion of its territory it retains the capacity to incur liabilities, and consequently the contractual relationship between the debtor and creditor is not destroyed.

(ii) There is therefore no direct obligation on the part of the successor state towards the creditor.

II. SECURED DEBTS

(a) *Pledged assets*

(i) It is suggested that the creditor whose debt is secured on state assets acquires over such assets a true right *in rem*.

(ii) Whether the debtor state be totally or partially absorbed in another, the latter, if it comes into possession of such assets, incurs a duty to respect the creditor's interest in them.

(iii) This duty of respect may be discharged either:

(a) by paying off the debt, or

(β) by permitting the creditor to exercise his rights against the security.

(b) *Pledged revenues*

(i) It is suggested that the creditor whose debt is secured only on revenues does not acquire over such revenues a true right *in rem*.

(ii) When only part of the debtor's territory is lost, therefore, no obligation devolves upon the successor state to respect the interest of the creditor in the revenues of such territory.

(c) *Local debts*

(i) Debts of an absorbed local area are secured only in the sense that their amortization is provided for out of local revenues. The creditor does not acquire in respect of such revenues a true right *in rem*.

(ii) Should such local area be totally absorbed in another state, however, the debt relationship is destroyed, and the successor state incurs exactly the same obligation towards the creditor as is incurred in the case of total extinction of a state.

THE PROBLEM OF JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

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THE reasons for the tendency, which has been on the increase since the end of the First World War, to do away with the doctrine of jurisdictional immunity of foreign states have been repeatedly stated. It is unnecessary, in this essay, to elaborate them in detail. The main—and articulate—source of the opposition to it has been the realization that the principle of immunity as originally applied by courts was intended to cover the political activities of the state as a sovereign entity in the strict sense of the word and that it has become obsolete and productive of injustice and inconvenience at a time when the operations of the state are increasingly extending into the commercial, industrial—and similar¹—spheres. However, the growing opposition to the jurisdictional immunities of foreign states has drawn its strength from factors more significant than modern developments in the economic sphere. These factors arise to a large extent from the challenge to the prerogatives of the sovereign state which denies to the individual legal remedies for the vindication of his rights as against the state in the matter both of contract and of tort, and which asserts a privileged position for the state in the procedural sphere. That challenge has been largely successful in most states under the rule of law. In France, a country which has led the way in the recognition of the responsibility of the state, occasionally even to the point of making it accountable for the acts of its legislative organs, the connexion between the denial of the immunity of the state and the ideas of the Declaration of 1789 has been conscious and acknowledged—though for reasons peculiar to that country these principles failed to secure full recognition in relation to the immunities of foreign states.² In Great Britain the immunity of the Crown, which was a survival of the personal immunity of the Sovereign, continued to assert itself with some tenacity. It yielded substantially, in the contractual sphere, even before the Crown Proceedings Act of 1947, to the dual impact of the implications of the rule of law and of the growing activities of the state in the economic and social spheres. The Crown Proceedings Act completed that process for most—though not all—purposes. Similar changes have

¹ For, as was shown in the case of *Krajina v. The Tass Agency* (see below, p. 271), the problem is not limited to purely commercial and contractual relations. In the *Conclusions* of the *Rapporteur* of the relevant sub-committee of the League of Nations Committee on Codification there was enumerated among the questions requiring elucidation in connexion with implied waiver of immunity the question of 'actions for damages for a tort or quasi-tort committed in the territory' (Doc. A, 1928, V, p. 54).

² See below, p. 234.

taken place in the United States of America and other countries.¹ In that climate of legal development the maintenance of the immunity of foreign states requires special justification. Public opinion and practical considerations do not permit too wide a gap between the law governing the immunities of the home state and the law, which many regard as increasingly artificial, unjust, and archaic, relating to the immunities of foreign states. It is against this background—not altogether unrelated to the incipient recognition of human freedoms as part of positive international law—that it may be opportune to re-examine the problem of jurisdictional immunities of foreign states.

I. *The argument in support of the doctrine of immunity*

There are, in the main, five arguments which have been relied upon by those who contend for the retention of the rule of immunity of foreign states. In the first instance, it has been urged that the obligation of courts to decline jurisdiction over foreign governments is firmly grounded in the principles of the independence, the equality, and the dignity of states; that the maxim *par in parem non habet imperium* follows directly from those principles; and that the assumption of jurisdiction over foreign states amounts to an exercise of *imperium* over them in disregard of the fundamental canons of international law. The accuracy of these propositions is discussed elsewhere in this article.²

Secondly, there have been some³ who, while denying that the rule of immunity follows from any basic principle of the law of nations, have maintained that it has now become so by virtue of a customary rule of international law and that it is valid and binding as such. However, as will be shown here, it is a fact that the courts of a considerable majority of states have departed from that assumed rule of international law, at least to the extent of exercising jurisdiction over foreign states in matters *jure gestionis*, without, as a rule, giving occasion for protest on the part of the foreign states concerned. Accordingly, in so far as the actual practice of states may be said to be evidence of customary international law, there is no doubt that the principle of absolute immunity forms no part of international custom.

Thirdly, it has been suggested⁴ that the preoccupation with the question of jurisdictional immunities by reference to the increased activities of the state in the economic sphere may not be wholly justified in view of the possibility that such activities may be only a passing phase in the life of states. Experience has not borne out that prediction. Independently of any

¹ See below, pp. 233–5.

² See below, pp. 226–32.

³ See, for example, Anzilotti in *Rivista di diritto internazionale*, 4 (1910), pp. 477 ff.

⁴ See Fitzmaurice in this *Year Book*, 14 (1933), p. 106.

retrogressive tendencies of totalitarianism, the welfare state has probably become, for the foreseeable future, a permanent feature of political organization.

IV. Fourthly, those who still favour absolute immunity have often relied on the argument that as, according to existing law, no execution by way of seizure or otherwise can in any case be levied against a foreign state, the exercise of jurisdiction, even if limited to acts *jure gestionis*, must remain no more than a nominal gesture. Yet it is by no means certain that immunity from execution is an inevitable or universally recognized rule of international law.¹ Moreover, in countries which adhere to the rule of immunity from execution in respect of a foreign state, a judgment against that state may not be altogether without effect. This is so even if we assume—and it is doubtful whether we are entitled to make that assumption without qualifications—that the foreign state will simply ignore the judgment. Even if ignored, the latter may become the starting-point for diplomatic action or, in suitable cases, for international judicial proceedings. There is no reason why the judgment should remain purely nominal in cases in which the defendant state possesses property within the jurisdiction. Also, the likelihood of the judgment being ignored depends on what is considered to be the accurate position of international law in the matter of jurisdiction over foreign states in general. So long as the view prevails that the exercise of such jurisdiction is not in accordance with international law, no moral opprobrium attaches to the refusal of a foreign state to pay attention to a judgment given against it, and instances of such refusal may be correspondingly frequent. The position is different if such exercise of jurisdiction is considered both lawful and proper.

V. Finally, the main argument in favour of absolute immunity from jurisdiction has been the view that what has been considered the only alternative to absolute immunity—namely, exercise of jurisdiction based on the distinction between acts *jure gestionis* and acts *jure imperii*—is impossible of definition and, therefore, of application. Apart from the fact that it disregards the third alternative, namely, the general abandonment of immunity, that argument appears to be, and probably is, decisive. Courts of different countries—and occasionally courts of the same country—have treated the same kind of activity in different ways. Thus the operation of railways by the state has been considered by some courts to be an activity of a public-law character; it has been regarded by others as partaking of the nature of an undertaking of a private-law nature. This, as between various countries, is hardly surprising seeing that while the Belgian law of 1869 declared that it is the duty of the state to provide rapid and easy communication for its citizens, the Belgian Court of Cassation held that

¹ See below, pp. 241, 242.

Holland, acting in her capacity as the owner of a railway, acted as a *personne civile*.¹ Transactions connected with a tobacco monopoly were held by a Roumanian court to be *jure gestionis* and as such subject to its jurisdiction.² An American court came to an opposite conclusion.³ While the activities of a state calculated to promote immigration were held by a Belgian court to be an act *jure imperii*, an Italian court held otherwise.⁴ Purchase of goods to be resold to nationals was held by one French court to be an act *jure gestionis*,⁵ by another to be an act *jure imperii*⁶—though in the latter case the possible explanation may have been that the office established by Switzerland in France for the purpose of purchasing goods was set up in pursuance of a Swiss decree ‘concerning the measures necessary for assuring the security of the country and the maintenance of neutrality’. That explanation, however, may be contrasted with the Belgian decision in *Monnoyer v. État Français*⁷ which treated as being *jure gestionis* the purchase of goods, by a French governmental agency, for the purposes of reconstruction of territory devastated by war. There has been a similar and clear divergence of practice with regard to state loans. The same applies to contracts relating to supplies for the army. Italian courts have held that a contract made by a foreign state for the purchase of shoes for its army was an act of a private-law nature and therefore outside the principle of immunity.⁸ A court in the United States decided that the same transaction constituted for the state ‘the highest sovereign function of protecting itself against the enemies’.⁹ The same view was expressed nearly a century before in a leading decision of the French Court of Cassation in the matter of the purchase of shoes for the Spanish army.¹⁰ It is with reference to such and similar transactions apparently of a purely private-law nature that in the course of the discussions in the League of Nations Committee of Experts for the Progressive Codification of International Law there were asked pertinent questions to which, in the nature of things, no conclusive answer was forthcoming. The French member of the Committee while conceding that the purchase of a torpedo-boat was an act *jure imperii*, expressed doubts about the position with regard to the purchase of arms for manufacturing war material or of supplies for a powder factory.¹¹ The answer, of

¹ *État néerlandais v. Société du chemin de fer Liègeois-Limbourgeois, Pasicrisie Belge*, 1909, vol. i, p. 294.

² *Banque roumaine de commerce et de crédit de Prague v. État Polonais, Revue de droit international privé*, 19 (1924), p. 581.

³ See below, p. 230.

⁴ See below, p. 253.

⁵ *État roumain v. Pascalet* (1924), *Dalloz hebdomadaire*, 1924, p. 260.

⁶ *Lakhovsky v. Gouvernement fédéral Suisse, Gazette du Palais*, 1920, vol. ii, p. 382.

⁷ (1927) *Pasicrisie Belge*, vol. iii, p. 129.

⁸ *Governo Rumeno v. Trutta, Giurisprudenza Italiana*, 1926, Part i (1), p. 774.

⁹ *Kingdom of Roumania v. Guaranty Trust Co. of New York*, (2nd) 250 Fed. 341, 343.

¹⁰ *Sirey*, 1849, Part i, p. 81; *Dalloz Périodique*, 1849, 1.

¹¹ Doc. C.P.D. 1/3 Session/P.V., pp. 55, 56.

typically limited usefulness, given by another member of the Committee, was that that question would have to be decided in accordance either with the law of the state engaged in the commercial transaction in question or the law of the state within whose jurisdiction it had taken place.¹

Moreover, it is no longer generally accepted that the economic activities of the state—such as state management of industry, state buying, and state selling—are necessarily of a purely 'private-law nature'; that they are '*jure gestionis*'; and that in engaging in them a state acts like a private person. In these and similar cases ostensibly removed from the normal field of its political and administrative activities, the state nevertheless acts as a public person for the general purposes of the community as a whole. This applies not only to states with a socialist economy where trading or management of industry have become a public function of the state. For the state always acts as a public person. It cannot act otherwise.² In a real sense all acts *jure gestionis* are acts *jure imperii*. When in *Berizzi Brothers v. Steamship Pesaro*³ the Supreme Court refused to accept the existence of an 'international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance or training of a naval force', it was expressing a view which, probably, is not far removed from reality—although it is not certain that the grant of immunity is the logical consequence of that opinion. For these reasons there is force in the view that, at least in modern conditions, the distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis. French judicial practice has arrived at that conclusion after many years of painful experiment and has abandoned the traditional distinction, for the purposes of delimiting the competence of judicial and administrative tribunals, between *actes administratifs d'autorité* and *actes administratifs de gestion*.⁴

It is doubtful whether the most searching attempt yet made to solve the

¹ It may be noted that Professor Niboyet, while approving, in *Sirey*, 1930, Part i, p. 50, cols. 2, 3, a decision of the French court in the latter sense, expressed the view that French courts have to consider as an emanation of the Russian state only such functions as according to French conceptions—a test in itself of considerable elasticity—have a public-law character. De Praag—in *Revue de droit international et de la législation comparée*, 3rd ser., 16 (1935), p. 124—expresses a contrary view.

² This aspect of the matter was presented forcibly and, it is believed, accurately, in 1893 by Chrétien in his *Principes de droit international public*. He said: 'L'État ne passe aucun acte, n'intervient dans aucun rapport juridique, sans que l'acte soit, directement ou indirectement, motivé par la nécessité de maintenir sa haute mission gouvernementale. . . . Il comprend bien ou mal sa mission; cela importe peu. Si l'on va au fond des choses, il ne peut jamais se présenter exclusivement comme personne privée.' Nys rejected for the same reason as being 'fantastic' the distinction between the two kinds of activities: *Le Droit international* (2nd ed., 1912), vol. ii, p. 340 ff. For a lucid survey of the authorities on the subject see Fairman in *American Journal of International Law*, 22 (1928), pp. 569–74.

³ (1926), 271 U.S. 562.

⁴ For a survey of the French judicial practice in the matter see Duguit, *Traité de droit constitutionnel*, vol. iii (2nd ed., 1923), pp. 39 ff.

difficulty—an attempt made in 1923 by M. Weiss, for a time Judge of the Permanent Court of International Justice¹—can be regarded as altogether successful. The gist of the theory propounded by him was that in determining whether an act is *jure imperii* or *jure gestionis* regard is to be had not to the object of the transaction but to its nature. The test, it is said, is not whether the transaction aimed at achieving an object directly connected with the political functions of the state as a sovereign entity such as the provision, through purchase, of means for its defence or a public loan; the test is whether, irrespective of its object, the juridical nature of the transaction is such that it can be entered into by an individual. An individual can make a contract. That alone is decisive. The question as to what are the objects pursued by the contract is of no consequence. In the same line of argument it might be said that a tort—a libel or trespass—can be committed by an individual. That again is the determining factor. There is no immunity in such cases. On the other hand, according to that view, such acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such. Such acts legitimately give rise to a claim to immunity. The criterion suggested would appear to be simple and easy of application. However, upon analysis, that test merely postpones the difficulty. To what extent is it true to say that contracts made by the state for the purchase of shoes for the army, or of a warship, or of munitions, or of foodstuff necessary for the maintenance of the national economy, are not immune from the jurisdiction for the reason that they are *contracts* and that an individual can make a contract? For can it not be said that these particular contracts can be made by a state only, and not by individuals? Individuals do not purchase shoes for their armies; they do not buy warships for the use of the state; they are not, as such, responsible for the management of the national economy.

It may be contended that the difficulty of drawing the line is not confined or peculiar to the distinction between acts *jure gestionis* and acts *jure imperii* and that it is proper and feasible that, given the broad meaning of the distinction, the line should be determined in doubtful cases by the courts. In fact this is what the courts of a number of countries have been doing in the past. But the question still remains whether the uncertainty produced by their decisions, the inconsistencies, and the resulting absence of an ascertainable standard capable of general application ought to be perpetuated. There are persuasive reasons for the submission that the answer to that question must be in the negative and that the law on the subject should—and can—be placed on a footing different from either

¹ 'Compétence ou l'incompétence des tribunaux à l'égard des États étrangers', *Hague Academy of International Law, Recueil des Cours*, 1923.

the existing doctrine of absolute immunity or the concession of immunity, by reference to the traditional distinction, in matters *jure imperii* as distinguished from those *jure gestionis*. For reasons already stated and for those which are elaborated below,¹ the objections to the doctrine of absolute immunity are, it is believed, decisive. It has been abandoned in most countries. It is productive of inconvenience, injustice, and resentment which may be more inimical to friendly international intercourse than assumption of jurisdiction. It is unlikely that public opinion—and legal opinion—will continue to countenance its retention. There is evidence that enlightened governments prefer not to appeal to it.² The fact that the other system—namely, that based on the distinction between acts *jure imperii* and *jure gestionis*—is open to serious and in the long run decisive objections does not mean that the principle of absolute immunity is the only alternative. There is another alternative which is consonant with the more recent developments in countries under the rule of law and which does away with a principle that places the sovereign state above the law. That alternative consists in making the foreign state accountable before otherwise competent courts in respect of claims put forward against it in the matter both of contract and tort in the same way in which the domestic state is subject to the law administered by the courts.³

II. *The doctrine of immunity and the principles of international law*

The solution, adumbrated in the preceding section, namely, the assimilation of the position of the foreign state to that of the organs of the domestic state in respect of the jurisdiction of courts in countries under the rule of law, appears on the face of it to be far-reaching and drastic. In fact, although it implies a change in the law as hitherto acted upon by the courts of many countries, it is probably not contrary to any generally accepted principle of international law or to any uniform practice of states in the matter. Undoubtedly, it fully abandons the doctrine of absolute immunity. However, that doctrine has already been jettisoned by the majority of states. In view of recent experience, of the overwhelming consensus of legal opinion, of economic necessities, and of the general tendency to subject the state—the domestic state and the foreign state—to the rule of law in all its manifestations, it is difficult to assume that it will continue to form part of the law. The doctrine of absolute immunity has been replaced in many countries

¹ See pp. 232–6.

² As is shown by the recent case of *The Ardennes (Owner of Cargo) v. The Ardennes (Owners)*, [1950] 2 All E.R. 517, where the defendants, the shipowners, were the Belgian Government. Judgment was given against them.

³ In the *Dollfus Mieg* case, [1950] 1 Ch. 333, 360, Somervell L.J. drew attention to the American case, *The Tampico*, 16 Federal Reports, where the same principle, i.e. assimilation of the foreign state to the domestic state, was suggested. And see below, pp. 245–6.

by the practice based on the distinction between acts *jure gestionis* and acts *jure imperii*. As shown, it is doubtful whether that distinction can accurately or profitably be accepted as the basis of future law. What is possible and desirable is to salvage from it that element which appears to be sound and practicable. This can probably be achieved by dint of an enumeration of some of the activities whose exemption from jurisdiction ought to continue and which have been included in the past within the notion of acts *jure imperii*, i.e. of acts of a public character in the strict sense of the word. The feasibility of an enumeration of that nature, which is intended to cover the exceptions from liability to jurisdiction, is examined in another part of this article.¹ These exceptions are of considerable scope and importance. They need not obscure the meaning of the wider change as here envisaged. That change, if accepted, would do away with the general immunity of foreign states in the matter of contract as well as of tort.

The question must accordingly be considered to what extent some such development implies a departure from any fundamental requirement of international law. Undoubtedly, it involves a departure from the existing practice of national courts or, what is the same thing, from the view which national courts have taken of the position of international law on the matter and their obligations thereunder. However, the time has come to inquire afresh whether there is in fact in existence a clear and categorical principle of international law which forbids the courts of a state to assume jurisdiction over another state. It is symptomatic of the existing position with regard to the entire subject of jurisdictional immunities that international practice shows no frequent instances of protests against assumption of jurisdiction, including execution, over foreign states. Governments occasionally communicate with one another in order to claim immunity in cases in which an attempt is made to bring them before a foreign court. Such communications are essentially in the nature of an appeal for intercession. They are not, as a rule, in the nature of protests. Neither are they followed by formal protests when the Government whose assistance is invoked refuses to act or when courts, in the free exercise of their judicial function, assume jurisdiction. When in the case of the *Attualità*, a vessel chartered by the Italian Government, the latter remonstrated in 1916 with the Government of the United States on account of assumption of jurisdiction over that ship by an American court, the remonstrance was based on the view that the assumption of jurisdiction in that case contravened the 'rules of international courtesy which are invariably observed when the sovereign rights of a foreign State are involved' and that it was 'inconsistent with the dignity of a Sovereign State'.² There were no persistent protests when Italian and Belgian courts and the Mixed Courts of Egypt paved the way in

¹ See below, pp. 237-9.

² Hackworth, *Digest of International Law*, vol. ii (1941), p. 428.

assuming jurisdiction over foreign states in matters *jure gestionis*; when the courts of many countries followed suit; or even when courts of some countries went to the length of assuming jurisdiction in the matter of execution. The fact that in some countries the grant of immunity from jurisdiction or execution has been made dependent upon reciprocity¹ shows, indirectly, that there is, in the view of these countries, no binding rule of international law on the subject. States do not make the observance of established rules of international law dependent upon reciprocity. Ordinarily, reciprocity is made to apply to concessions and privileges to which states are not entitled, or which they are not bound to grant, according to ordinary international law.

The view that there is at present no rule of international law which obliges states to grant jurisdictional immunity to other states is, admittedly, unorthodox and, being at variance with the view almost uniformly expressed in textbooks, at first sight startling. This is so, in particular, if we contrast it with the opinion, again uniformly expressed by writers, to the effect that one of the consequences of independence—or equality—of states is the duty of municipal courts to abstain from exercising jurisdiction over foreign states and that such duty is a rule of international law. That statement is now usually accompanied by the acknowledgement of the exception connected with acts *jure gestionis*. It is not explained why, if immunity from jurisdiction is a rule of international law, it should not apply to acts *jure gestionis*; or, assuming that absolute immunity from jurisdiction was originally a rule of international law, when and how states consented to a limitation of that rule in matters *jure gestionis*.

It is submitted that the view, so often expressed in textbooks and elsewhere, that the immunity of foreign states and their property from the jurisdiction of courts of foreign states follows from a clear principle of international law, namely, the principle of equality and independence of states needs re-examination. It finds no support in classical international law. Grotius does not refer to it. Bynkershoek occasionally deprecates it: 'Principes dum contrahunt haberi privatorum loco.'² Vattel, after admitting it with regard to the person of the foreign sovereign, is silent with regard to the position of foreign states as such.³ It is rooted, to some extent, in the doctrine of the personal immunity of heads of states. It is with regard to these that the distinction between acts *jure imperii* and acts *jure gestionis* first attained prominence in Germany in the eighteenth century in the relations of the numerous German states and principalities. Although in various decisions given in the nineteenth century on the subject much

¹ See below, p. 246.

² For a lucid analysis of Bynkershoek's views on the subject see Gmür, *Gerichtsbarekeit über fremde Staaten* (1948), pp. 38–43. See also Barbeyrac's translation of and notes on Bynkershoek's *De foro competente legatorum* (1723), pp. 43, 46.

³ Book IV, chapter vii, p. 108.

reliance was placed on the classical decision of Mr. Justice Marshall in *Schooner Exchange v. MacFaddon*,¹ it is doubtful whether that decision can accurately be quoted as an authority in favour of the rigid principle of jurisdictional immunity of foreign states. It is clear from the language of that decision that the governing, the basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver—express or implied—of its jurisdiction on the part of the territorial state. Any derogation from that jurisdiction is an impairment of the sovereignty of the territorial state and must not readily be assumed. In fact it is not easy to see why the principle of independence and equality should preclude the courts of a state from exercising jurisdiction over another state and its property so long as the state exercising jurisdiction merely applies its ordinary law, including its rules of private international law, and so long as it applies it in an unobjectionable manner not open to the reproach of a denial of justice or of the disregard of the legislative and administrative sovereignty of the foreign state. The principle of independence logically requires that the courts of a state should recognize as valid the legislative acts of another recognized state in so far as these are not contrary to international law and to fundamental principles of justice, so long as they do not require other states to enforce foreign public or fiscal law, and so long as they are not intended to have extraterritorial effect (to give them, as a matter of international duty, extraterritorial effect would be, once more, to admit the right of a state to reach out into the domain of the foreign state). Beyond this it does not go. Thus no legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to contracts concluded or torts committed in the territory of the state assuming jurisdiction. On the contrary, the sovereignty, the independence, and the equality of the latter are denied if the foreign state claims as a matter of right—as a matter of international law—to be above the law of the state within the territory of which it has engaged in legal transactions or committed acts entailing legal consequences according to the law of that state.² The absence of any denial of independence or equality appears even more clearly when the state exercising jurisdiction over a foreign state submits itself, within the same sphere, to the full operation of its own law without claiming any privileged status or immunity.

¹ (1812), 7 Cranch's Reports, 116.

² For a recent example of reliance on the sovereign equality of states as a reason for immunity from jurisdiction see the observations of Professor A. de Lapradelle in connexion with the report of M. Lémonon for the meeting of the Institute of International Law at Siena (1952). He says: 'L'égalité souveraine des États, indépendants membres de la société internationale, ne leur permet de venir ni en demande ni en défense devant les tribunaux d'un autre État' (p. 106). He says with regard to the jurisdiction of municipal courts in the matter: 'Pour celle-ci, l'État, demandeur ou défendeur, est trop grand et cette justice trop petite.'

A closer examination of the origin and of the development of the doctrine of immunity of foreign states from jurisdiction shows that it is perhaps not so much the principles of independence and equality which have nurtured the soil in which that doctrine has flourished, but factors of a different kind. These have been: (a) considerations of the dignity of the sovereign state and (b) the traditional claim, transposed into the international arena, of the sovereign state to be above the law and to claim, before its own courts, a privileged position compared with that enjoyed by the subject. Both these aspects may now be considered.

The view that the assumption of jurisdiction over foreign states is contrary to their dignity and as such inconsistent with international courtesy and the amity of international relations is a persistent theme of judicial decisions on the subject. In so far as the doctrine of immunity owes its acceptance to the decisions of the courts of the United States it is explained to some extent by the fact that it was by reference to dignity of the states of the Union that their immunity from suit was urged insistently and repetitiously. During the debates preceding the adoption of the Virginian Convention in 1788 John Marshall stressed the element of indignity inflicted upon a state by making it a defendant in an action.¹ In the leading cases of *Chisholm v. Georgia* the main argument for the defendant state was that it was a 'degradation of sovereignty in the states to submit to the supreme judiciary of the United States'.² The courts of the United States have gone to the length of relying on the argument of dignity in the matter of immunity of foreign states from taxation. Thus we find the Court of appeals of Kentucky saying in 1923 in the matter of taxation of tobacco owned by the French Government: '... if one nation enters the territory of another with its consent, for the purpose of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself or its sovereign rights within the jurisdiction of the other and we know of nothing more calculated to degrade the dignity of an independent nation than for another to attempt to exercise over it the sovereign right of taxation'.³ Yet the courts of many countries have often given effect to the state's power of taxation in similar circumstances. In England 'dignity', coupled or identified with 'independence', played an important part as an explanation of the doctrine of immunity of foreign states. It did so in *The Parlement Belge* where the Court said: 'From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the

¹ 3 Elliot, *Debates* (2nd ed., 1836), p. 555.

² 2 Dall. 419, 425 (U.S.) 1793.

³ *French Republic v. Board of Supervisors of Jefferson County* (1923), 200 Ky. 18; 252 S.W. 124.

exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.’¹ In the same case Brett L.J. referred variously to ‘independence and dignity’² and to ‘equality and independence’³ as the basis of immunity. In *The Cristina* Lord Macmillan invoked ‘dignity, equality and independence’ of foreign states as the foundation of their immunity.⁴ The part which considerations of dignity have played in the matter of award of costs against and to foreign states is referred to below.⁵ There is a close similarity between the manner in which the ‘dignity of the sovereign’ was used as a justification of sovereign immunity within the state and the way in which it was relied upon for the same purpose with regard to the jurisdictional immunities of foreign states.⁶

It is submitted that these strained emanations of the notion of dignity are an archaic survival and that they cannot continue as a rational basis of immunity.⁷ This would be the case even if the level of amenities of international intercourse—singularly lacking, in the relations of some states, in the traditional scrupulous respect for the dignity and the susceptibilities of foreign states—had not fallen below the standards punctiliously adhered to before the First World War. Such jurisdictional immunities as Soviet Russia may have enjoyed in 1951 in the United States were not due to considerations of the dignity of the Russian state. However, quite apart from what may be a passing phenomenon, any reconsideration of the question of immunity may well adopt a critical view of ‘dignity’ of states traditionally associated with the grant of immunity. A state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards and on a footing of equality with the state within which it concludes a contract or commits a tort. The dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country than it is by submission to their own law. As English judges have occasionally

¹ *Per* Esher L.J. (1880), L.R. 5 P.D. 197, 207.

² *Ibid.*, at p. 214.

⁴ [1938] A.C. 485, at p. 498.

³ *Ibid.*, at p. 220.

⁵ See below, p. 243.

⁶ The doctrine that limitation of actions does not apply to the state—*nullo tempore occurrit regi*—is commonly stated to have been based on the view that the king was so occupied with the cares of government that he ought not to suffer from the negligence of his servants. But, in *Sir Edward Coke's* case, the argument of Hobart C.J. suggests that the maxim was accepted originally, as required by the paramount dignity of the sovereign. This was also, to some extent, the reason of immunity from estoppel and of the doctrine that laches do not apply against the state. In *Monckton v. Attorney-General*, 2 Mac. G. 402, Lord Cottenham explained the petition of right as existing ‘only for the purpose of reconciling the dignity of the Crown and the rights of subjects. . . .’ In *United States v. Lee* (1882), 106 U.S. 196, at p. 248, the court justified the doctrine of immunity on grounds of ‘sovereign dignity’.

⁷ Yet it is of interest to note that van Praag, the most modern adherent of absolute immunity, supports it on the ground that assumption of jurisdiction over a foreign state is inconsistent with respect due to it: *Revue de droit international et de la législation comparée*, 3rd series, 16 (1935), p. 100.

observed, the dignity of a foreign state may suffer more from an appeal to immunity than from a denial of it.¹ In so far as the jurisdictional immunity of foreign states is assumed to be based on their dignity, the time has probably come for abandoning what is now no more than an incantation alien to the conception of the rule of law, national and international, and to the true position of the state in modern society.

III. *Jurisdictional immunity and the rule of law*

Although reliance on 'dignity' has loomed large in judicial reasoning in connexion with the doctrine of immunity of foreign states from jurisdiction, it is probable that a substantial explanation of that doctrine will be found in the traditional immunity of the sovereign state from suit in its own courts. The entire concept of state immunity—whether of the foreign state or of the territorial state—is a survival of the period when the sovereign, if he did justice to the subject, did so as a matter not of duty but of grace. It is an inheritance, not as indirect as it may appear, of the principle that the personal sovereign—and subsequently the state—is *legibus solutus*. It is one of the manifestations not so much of the Austinian as of the Hobbesian conception of state—a conception to which Mr. Justice Holmes gave expression in a frequently cited and often criticized passage in *Kawananakoa v. Polyblank*² in which he based the immunity of the state 'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends'.³ The philosophy of Mr. Justice Holmes was not altogether in harmony with the contemporaneous developments in the law of the United States in the direction of limiting the immunity of the state.⁴ But it gave expression to the original doctrine

¹ See below, p. 249.

² (1907), 205 U.S. 349, 353.

³ In the *Western Maid* (1921), 257 U.S. 419—at a time when the State Department was, in a different sphere, embarking upon a policy of relaxing claims to immunity—Mr. Justice Holmes was pursuing the same line of thought. As the United States had not consented to be sued in maritime tort, it could not, in any legal sense, have been guilty of a tort. The sovereign, he said, is above the law which it applies to others; an act is a tort, in the legal sense, only because the state makes it so. These and similar pronouncements have proved, it may be added, one of the principal reasons of the criticism of Mr. Justice Holmes's contribution to the development of the law: see Palmer, 'Hobbes, Holmes and Hitler' in *American Bar Association Journal*, 31 (1945), p. 569; Briggs, 'Justice Holmes was not a Ladder to Hitler', *ibid.* 32 (1946), p. 631; Palmer, *ibid.*, p. 635. It is of interest to compare Mr. Justice Holmes's explanation of the principle of immunity with that given by Cockburn C.J. in *Feather v. Reg.* (1865), 6 B. & S. 257, 295. He said: 'a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done to a subject by the authority of the Sovereign. For from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize a wrong. . . . As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise.'

⁴ See his observation, made in 1925, that 'public opinion as to the peculiar rights and preferences due to the sovereign has changed' (*Davis v. Pringle* (1925), 268 U.S. 315, at p. 316).

of the common law, taken over by the colonies, of the prerogative immunity of the sovereign from suit. That inheritance explains to some extent—but only to some extent—what some regard as a juridical mystery inherent in the adoption of what was essentially an absolutist principle by a country which had risen in revolt against the unlimited sovereignty of the Crown.

A further explanation of the willing acceptance of that inheritance—an explanation which shows a direct connexion of the American practice with the question of immunity of foreign sovereigns from suit—lies in the impact of the problems created by the mutual relations of the Federation and the member states. Hamilton's insistence, in the *Federalist*, on the imperative necessity of granting to member states immunity from suit, is most instructive on this point.¹ Subsequent to the decision in *Chisholm v. Georgia*² the fear of encroachment on the sovereignty of states by actions brought against them by individuals resulted in the 11th Amendment to the Constitution which provided as follows: 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or presented against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' That aspect of immunity has been fully maintained. It was emphatically reaffirmed in connexion with a case in which a foreign state was the plaintiff.³

While the influence of the common law doctrine of the immunity of the sovereign and the assumed necessity of safeguarding the position of the states of the Union explain the emphasis of the courts of the United States on state immunity in both the domestic and the international spheres, recent developments in that country have followed the general tendency to limit the claim to immunity as being inconsistent with the notion of a state under the rule of law. The changed attitude of the Supreme Court in the matter of jurisdictional immunities of foreign states is noted elsewhere in this article.⁴ As to the immunities of the state in general Mr. Justice Frankfurter observed in 1939 in a leading case that 'the present climate of opinion . . . has brought governmental immunity from suit into disfavour'.⁵ More recently, in 1949,

¹ No. 81. He wrote of immunity: 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and that exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable.'

² 2 Dall. 419 U.S. 1793.

³ *Monaco v. Mississippi* (1934), 292 U.S. 313.

⁴ See below, p. 269, for a comparison of the decisions in *The Pesaro* and *United States of Mexico v. Hoffmann*.

⁵ *Keifer & Keifer v. Reconstruction Finance Corporation* (1939), 306 U.S. 381.

in *Larson v. Domestic and Foreign Commerce Corp.*,¹ the Supreme Court gave some support to the argument that 'the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible'. The Court said: 'The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend.' In the field of legislation the setting up in 1885 of the Court of Claims endowed with jurisdiction over claims against the United States founded upon 'any law of Congress or . . . upon any contract, express or implied', was followed by the Tucker Act of 1887 granting jurisdiction, in the matter of such claims, to Federal district courts, by various enactments relating to other causes of action (such as the Statute of 1920 relating to Federal liability for admiralty and maritime torts), and, finally, by the Federal Torts Claims Act.

In France the rigid limitation of the immunity of the state was not followed in the nineteenth century by a corresponding restrictive interpretation of immunities of foreign states. The probable explanation of that fact is that French courts have regarded matters pertaining to foreign affairs as being particularly within the domain of the executive and outside the province of the judiciary. They have done so, for instance, to the point of refusing to interpret treaties other than those regulating purely private interests of individuals. Foreign affairs constitute the most important part of *actes de gouvernement* which are not subject to review either by the courts or by the Conseil d'État. As Duguit put it in this connexion, 'l'idée de souveraineté est restée plus vivante dans les relations extérieures des États que dans son activité intérieure'. 'Cette persistance', he added, 'n'est certainement pas étrangère au maintien de l'irresponsabilité de l'État en matière diplomatique.'² However, since the First World War—and even before that—French courts have been gradually abandoning the doctrine of the absolute immunity of foreign governments.³

In Germany the Weimar constitution laid down, in Article 131, the broad principle of the responsibility of the state for the acts of its officials. In addition to the responsibility of the officials themselves, it provided expressly that recourse to ordinary courts of justice shall not be excluded. Previously the Roman law conception of the *fiscus*, although the question of its independent legal personality was a subject of controversy, paved the way for subordinating some—but only some—activities of the state to rules of private law.

It is probable that, as in the United States, so also in Great Britain, the somewhat rigid application of the doctrine of the absolute immunity of foreign governments was not uninfluenced by the immunity of the Crown.

¹ 337 U.S. 682, 703.

² Op. cit., p. 475.

³ See below, pp. 260-2.

In so far as the Crown Proceedings Act, 1947, has finally made available to the citizen the ordinary legal remedies against the Crown, it has cleared the path, also in relation to foreign states, for the completion of the development, which has been unmistakable in this and in other countries, in the direction of putting the state and the individual on a footing of equality before the law. As early as 1922 Professor Holdsworth noted the incipient tendency, in the matter of the rights of the subject against the Crown, to render the competence of courts, so far as possible, coextensive with the remedies available to one subject as against another.¹ But he observed that, at the time, the subject's rights against the Crown were, in general, still being governed by the rules of medieval common law.² That stage has now been overcome. In the internal sphere the law has curbed 'the chronic dislike of sovereigns (however democratic) to pay for wrongs done'.³ For, essentially, the immunities of foreign governments are only one aspect of what is occasionally referred to as the dishonesty of sovereignties—a claim to a prerogative which the modern state inherited from its medieval predecessor.

It has been shown that no consideration essential to international law—such as the independence or the equality of states—stands in the way of its relinquishment in relation to foreign states. Its abandonment is required not only by the expansion of the activities of states and the injustice and inconvenience resulting from the disregard of these developments in relation to claims of individuals.⁴ At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state—our own state or a foreign state—screens itself behind the shield of immunity in order to defeat a legitimate claim. In a trenchant analysis Dr. Allen has referred to the 'brutal cynicism' in the conduct of the litigation which resulted in the successful assertion of the immunity of the State of Kelantan, after it had previously agreed to arbitration, in the action brought against it by the Duff Development Company.⁵ Without subscribing to the details, as there recounted, of the allocation of responsibility for the conduct

¹ *Law Quarterly Review*, 38 (1922), p. 296.

² *Ibid.*, p. 295.

³ Judge Hough in *Harvard Law Review*, 37 (1924), p. 541.

⁴ In the municipal sphere the extension of the activities of the government was largely responsible, at the close of the nineteenth century, for the enlargement of the scope of remedies against the Crown in relation to colonial governments (*Farnell v. Bowman* (1887), 12 App. Cases, at p. 649). It is with reference to this and similar cases that we find Maitland saying that 'it is a wholesome sight to see the Crown sued and answering for its torts' (*Collected Papers*, vol. iii, p. 263).

⁵ *Bureaucracy Triumphant* (1931), p. 14. And see *Duff Development Co. Ltd. v. Government of Kelantan*, [1924] A.C. 797, and, for a recent affirmation of that decision, *Kahan v. Federation of Pakistan*, [1951] 2 K.B. 1003, 1016.

of the proceedings in that case, it must be admitted that the charge adequately expressed what was the essence of the situation. That situation, in that and in most other cases of a claim to immunity, consists in an unwarranted—and often petty—refusal to satisfy what would otherwise be a good and enforceable legal claim. It amounts, in fact, to a denial of justice.¹ English, and other, courts have occasionally castigated in unmeasured terms the impropriety of such appeal to sovereign rights.² It is this essential incompatibility of the doctrine of jurisdictional immunity with the principle of the subjection of the sovereign state to the rule of law which explains the strength—we might say, the vehemence—of the opposition to the maintenance of that doctrine and the fact that only a diminishing minority of writers are willing to support it.³ It is this factor rather than the expansion of the activities of the state and the unfairness of its competition with the less privileged private individual that is the paramount feature of the situation.

IV. *Assimilation of jurisdictional immunities of foreign states to those of the domestic state*

The following conclusions may provisionally be drawn from what has been said in the three preceding sections of this essay: (1) the doctrine of absolute immunity of foreign states from jurisdiction has been largely abandoned by judicial practice; (2) that doctrine has no foundation in the principles of international law; (3) the same applies to the doctrine of limited immunity, as based on the distinction between acts *jure imperii* and acts *jure gestionis*, which is still adhered to by the courts of a large majority of states; (4) the doctrine of limited immunity does not provide a workable

¹ Professor Sibert, *Traité de droit international public*, vol. i (1951), p. 273, says with regard to the denial of the right of execution: 'L'attachement que de telles solutions entretiennent pour le faux dogme de la souveraineté de l'État aboutit à un véritable déni de justice et fait, là où elle est possible, de la poursuite de cet État étranger devant les tribunaux de l'autre État une manifestation illusoire.'

² See below, pp. 249, 271.

³ That minority includes van Praag in *Revue de droit international et de la législation comparée*, 3rd ser., 15 (1934), pp. 652–82, and 16 (1935), pp. 100–37; Provinciali, *L'Immunità giurisdizionale degli Stati esteri* (1933) (with some qualifications), see pp. 81 ff.; Fitzmaurice in this *Year Book*, 14 (1933), pp. 101–24. See, on the other hand, Weiss in *Recueil des Cours de l'Académie de droit international*, 1923, pp. 525–51; Ch. de Visscher in *Revue de droit international et de la législation comparée*, 3rd ser., 3 (1922), pp. 149–79, 300–35; Fensterwald in *Harvard Law Review*, 63 (1950), pp. 614–42; Spruth, *Gerichtsbarkeit über fremde Staaten* (1929); Gmür, *Gerichtsbarkeit über fremde Staaten* (1948), and the same in the Swiss *Annuaire de droit international*, 7 (1951), pp. 9–76. See also the comment to Article 11 of the Draft Convention on the subject of the Harvard Research Bureau of 1932: 'National courts have been slow to break away from the traditional conceptions of state sovereignty, independence and equality, but gradually the demands of justice and the necessities of the situation have been reflected in a growing tendency in the jurisprudence of many countries to emphasize exceptions to state immunity rather than to emphasize the basic rule itself' (at pp. 473, 474). The Resolutions adopted in 1891 by the Institute of International Law went far in that direction: *Annuaire* (1891). See also Loewenfeld in *Transactions of the Grotius Society*, 34 (1949), pp. 111–26, and, in particular, Fairman in *American Journal of International Law*, 22 (1928), pp. 566–89.

basis for a regulation of the problem of jurisdictional immunities by reference to rules capable of general application; (5) jurisdictional immunity of foreign states—either in its absolute form or when limited to so-called acts *jure imperii*—is, like the jurisdictional immunity of the domestic state, contrary to the wider principle which postulates the submission of the instrumentalities of the state to the ordinary operation of law as administered by courts.

The practical consequence necessarily following from these conclusions would seem to be the abolition, subject to specified safeguards and exceptions, of the rule of immunity of foreign states. That end can be achieved either by way of international agreement or by unilateral legislative action of states which have subjected their own governmental organs to the jurisdiction of their courts and which may decide to put on the same basis the position of governmental instrumentalities of foreign states. The merits and prospects of international regulation of abolition of jurisdictional immunities are discussed later in this essay.¹ So far as regulation, in that direction, by way of municipal legislation is concerned, reasons have been given why, subject to specified safeguards and exceptions, it can be achieved in full accord with the international obligations of the state. It may now be convenient to outline some of these principal safeguards and exceptions:

In the first instance, immunity must remain the rule with respect to the legislative acts of a foreign state and of measures taken in pursuance thereof. This would include, for instance, immunity of a foreign state—as distinguished from persons who acquire title from it—in respect of nationalization of property of aliens by virtue of a general statute or decree even if considered to be contrary to international law. It is true that a foreign state may be tempted to avoid its contractual obligations by enacting appropriate legislation. In that case, which cannot be regarded as typical, the remedy against the state itself would have to be of a diplomatic nature. Such immunity with regard to legislative acts would merely leave the foreign state in the same position as the domestic state which cannot be sued before its courts in respect of the acts of its legislature.

Secondly, there must be immunity from jurisdiction in respect of the executive and administrative acts of the foreign state within its territory, such as alleged unjustified expulsion or exaction of dues or wrongful imprisonment or, generally, denial of justice.² In particular no action should

¹ See below, p. 247.

² With regard to immunity in respect of denial of justice in the strict sense of the word, i.e. at the hands of judicial authorities, it will be noted that in England the Crown enjoys that immunity under Section 2 (5) of the Crown Proceedings Act of 1947 relating to the liability of the Crown in tort. A United States Statute of 1938 (52 Stat. 438) provides for a remedy against the state in cases of unjustified conviction or imprisonment.

lie with regard to torts committed by foreign states and their organs in their own territory. These must be left either to judicial remedies within that foreign state or to appropriate diplomatic action in accordance with the accepted practice of diplomatic protection of citizens abroad.¹

Thirdly—to refer, by way of example, to the position under English law—the principle of immunity must continue with respect to contracts made with or by the foreign state except contracts which have been concluded in the United Kingdom or which, though concluded abroad, contain elements which would cause an English court to apply to them rules of English law by virtue of rules of private international law as understood by English courts. For it must be of the essence of any comprehensive regulation of the subject that the general abolition of immunity should not place the foreign state in a position less advantageous than that of private individuals by submitting that state to jurisdiction in cases in which, by virtue of the operation of rules of private international law, the courts would have no jurisdiction in a private action. On the other hand, it seems proper that English courts should have jurisdiction if the contract in question, though concluded abroad, is to be performed in England, or if it refers specifically to English law as the proper law of the contract, or if for any other reason, according to rules of private international law, an English court would hold it to be subject to English law.²

Fourthly, no action should lie or execution be levied against a foreign state contrary to the accepted principles of international law in the matter of diplomatic immunities. Neither should a man-of-war or a vessel assimilated thereto or an aircraft forming part of the armed forces of a foreign state be subject to an action in rem, seizure, or arrest.³ Such exemption from liability to actions *in rem* and seizure would indirectly emphasize the liability

¹ In the matter of torts the foreign state would thus be placed to some extent, as far as the United Kingdom is concerned, in a position of equality with the Crown. For although the latter can be sued for a tort committed abroad, it can—as would appear from the proviso to s. 2 (1) of the Crown Proceedings Act of 1947—set up the defence of Act of State, a defence applicable to torts committed in relation to aliens abroad (see below, p. 245).

² In this connexion the following question would require consideration, to take the United Kingdom as an example: If the position of foreign states is to be assimilated to that of the Crown, what shall be the extent of their immunities in respect of contracts of service concluded by them with their employees, whether their nationals or not, in the United Kingdom? In the United Kingdom the relation between the Crown and its servants is not of a contractual nature and therefore not subject to the ordinary jurisdiction of courts, especially with regard to dismissal, reduction of pay, and arrears of pay, although with regard to the latter s. 27 (1) of the Crown Proceedings Act has introduced an element of doubt. The courts of a number of countries, while assuming jurisdiction with regard to transactions of foreign state agencies on the ground that these are *jure gestionis*, have declined jurisdiction with regard to contracts of service made by these agencies on the ground that in entering into them the state acts *jure imperii* (see below, p. 253). As in the United Kingdom there may be, in this particular sphere and in other spheres, a difference between agencies which are identified with the Crown and corporations which are not, the question will arise to what extent are these differences applicable to foreign agencies.

³ Such immunity attaches to British warships and aircraft under s. 29 of the Crown Proceedings Act. It will be noted that there is no immunity in the United Kingdom with respect to actions

of the foreign state for the contractual obligations undertaken on behalf of warships and for torts committed by those responsible for them. This, in general, must also be the position with regard to the contractual and tortious responsibility of a state in respect of its armed forces in a foreign country. Admittedly, the exception to be conceded in connexion with diplomatic immunities is one of accommodation, calculated to soften the impact of a somewhat drastic innovation, rather than of principle. Courts of some countries have not hesitated, in appropriate cases, to assume jurisdiction over foreign states even when the subject-matter of the action had some relation to diplomatic activities.¹ It is probable that, in modern conditions, the entire principle of diplomatic immunity may call for reconsideration. However, improvements in the content of international law are not made easier by being attempted simultaneously in various directions.

It is submitted that if a state were to adopt legislation on the lines indicated above—i.e. by placing, subject to specified safeguards and exceptions, foreign states in the same position of subjection to the jurisdiction of courts which it occupies in the matter of actions brought against itself—it would not be disregarding any clear or binding principle of international law. If, as the result of jurisdiction assumed in pursuance of such legislation, a foreign state were to bring a complaint before the International Court of Justice, it is unlikely that the Court would find that a rule of international law has been violated and that international responsibility has been incurred. It is very probable that the law of the countries, if any,² which still grant absolute immunity to foreign states, goes beyond the requirements of international law. The great majority of countries now decline to grant jurisdictional immunity to foreign states in what is described as acts *jure gestionis*. It is not contended by anyone that their attitude is contrary to international law. But does not the further development as here outlined go substantially beyond that? Does it not purport to confer upon national courts unlimited jurisdiction in matters usually described as being *jure imperii*? It is not believed that it does. The exceptions by which it is surrounded cover substantially what is generally intended to be included in the notion of acts *jure imperii*—save that, in particular, it specifically excludes from the scope of acts *jure imperii* contracts made and torts committed by a state outside its territory. Thus, if the cause of action arises out of contract for the purchase of goods, there would be no room for immunity, regardless of whether the contract is for purchase of equipment for the army or whether it is made for the purpose of making a claim against the Crown arising out of damage caused by a warship except that the action must be brought within the period of one year fixed by the Limitation Act, 1939, for public authorities.

¹ See below, p. 244.

² See below, pp. 268–71.

financial profit. To that extent the solution here outlined is based on a restricted interpretation of acts *jure imperii*. While not countenancing the assumption of jurisdiction in a way calculated to interfere with the sovereign rights of foreign states, that solution does not adopt as the basis of legislation the distinction, which experience has proved to be impracticable and productive of uncertainty, between acts *jure gestionis* and acts *jure imperii*.

The question of the conformity of the development as here envisaged with the principles of international law on the subject has been elaborated here in some detail for what appear to be cogent reasons. It is important, with regard to a problem which looms so large in decisions of courts of many countries and which has been so persistently, though inaccurately, related to the independence and the dignity of states, that nothing should be done which may seem to set aside any truly essential principle of international law or to be designed to meet some passing needs in relation to a particular state or groups of states. The problems involved are wider and more significant than the anomalies disclosed in any particular judicial decision specially offensive to public opinion or the more general phenomenon of the expanded activities of states in the economic and cognate fields. At the same time it is of importance to scrutinize any proposed change from the point of view not only of the existing law but also of convenience and of the requirements of friendly international intercourse. The normal exercise of jurisdiction of courts in actions against foreign states may in itself remove a frequent source of friction and resentment. From the point of view of securing a friendly atmosphere in international relations judicial remedies against foreign states may be preferable to diplomatic action necessitated by the refusal of those states to submit to jurisdiction. It is well possible that, if absolute immunity ceases to be the rule, vexatious actions may be brought against foreign states with the view to embarrassing them. However—although this is not generally realized—even under a system of full jurisdictional immunity there is nothing to prevent a plaintiff from bringing such actions, with all the attendant publicity and inconvenience, until the courts have finally declared themselves incompetent. Moreover, courts may be trusted to discourage, by appropriate award of costs, any abuse of their process. In general, the assumption of jurisdiction over foreign states in the past has not given rise to international friction. The dangers, if any, lie not in the exercise of jurisdiction, but in the abuse of it by way of denial of justice through partiality, delay, or otherwise. No such dangers need be apprehended in countries under the rule of law. However, should a foreign state consider in any particular case that there has taken place a denial of justice or an assumption of jurisdiction in excess of the permissive provisions of the law, there is no reason why

it should not have recourse to appropriate international remedies. There would be no difficulty in the matter in all cases in which the Optional Clause is effectively in operation in the relations of the states concerned. Moreover, it would be feasible and proper for a state when enacting legislation which may appear to some to be of a novel and drastic nature to declare that it will be ready to submit to the International Court of Justice, also in relation to countries with regard to which the Optional Clause is not effectively in operation, any complaints arising out of alleged improper application of such legislation.

V. *Some connected problems*

1. *Seizure and execution*

There are a number of questions which will require consideration in connexion with any modification or abolition of the rule of jurisdictional immunities of foreign governments. In particular, the question would arise whether such reform should extend to seizure and execution. There seems to be no convincing reason why it should not. In England, under the Crown Proceedings Act, 1947, the Crown enjoys immunity from execution (though the Act provides for a process of certification of orders made against the Crown). This is so for the reason that there is no question of the Crown refusing to satisfy a judgment. That assurance does not exist in the case of foreign states—a consideration which provides an answer to the argument that as the state does not admit execution against itself it can hardly expect foreign states to submit to it.¹ However, does not immunity from seizure—whether by way of attachment or execution—constitute a rule of international law so generally accepted that any departure from it would constitute a most drastic innovation? In the matter of execution the courts of the majority of countries probably still adhere to the principle of absolute immunity—though recent developments have made inroads, also in that sphere, upon the established practice. Although Belgian courts for a time declined to go to the length of permitting execution,² the Civil Tribunal of Brussels in a recent decision containing a detailed discussion of the fundamental issues involved emphatically dissociated itself from the previous practice.³ In the *Consular Premises (Greece)* case the Court of Athens observed that it was not necessary, in the case before it, to go into the question

¹ See the observations of Madame Bastid to the Report of M. Lemonon for the meeting of the Institute of International Law in 1952, p. 49.

² See, for example, *West Russian Steamship Co. v. Captain Sucksdorff*, *Annual Digest*, 1919–22, Case No. 103; *State of Portugal v. Sauvage*, *ibid.*, Case No. 104; and, in particular, *Brasseur and Associates v. Republic of Greece*, *ibid.*, 1931–2, Case No. 164.

³ See the judgment of 30 April 1951 in *Société Commerciale de Belgique v. L'État Hellénique*, where the Court said: 'Le pouvoir d'exécution est la conséquence du pouvoir de juridiction'—*Journal du droit international*, 79 (1952), p. 244.

whether execution was admissible with regard to the acts of a foreign state of a private-law nature seeing that 'one must assume that a foreign State will voluntarily submit to execution'.¹ A Greek Law passed in 1938 permitted execution subject to the authorization of the Minister of Justice; that Law was relied upon in a decision, given in 1949, of the Court of Appeal of Athens.² The frequently changing practice of Dutch courts shows occasional examples of execution against foreign states.³ As shown below, the recent practice of Switzerland and France permits such execution.⁴ With regard to the latter the decision of the Court of Cassation in *Union of Soviet Socialist Republics v. Association France Export*⁵ bears directly upon the point. In Switzerland a decree of the Federal Court of 24 October 1939 made execution dependent upon the authorization of the Federal Council. It would appear that, apart from that decree, the immunity of foreign states from execution, in Switzerland, depends upon reciprocity.⁶ In Italy, according to a Law of 15 July 1926,⁷ acts of execution and attachment in respect of the property of foreign states are permissible subject to authorization of the Minister of Justice. This appears also to be the position in Soviet Russia according to a decree of 14 June 1929. The Mixed Courts of Egypt permitted execution in matters *jure gestionis*.⁸ On the other hand, in the United States of America courts have affirmed immunity from execution even in cases in which they assumed jurisdiction on the merits.⁹

It is significant that states affected by measures of execution have not as a rule protested against it as being unlawful. In fact it may be difficult to adduce reasons of principle which would require in the matter of execution a rule different from that obtaining in the matter of jurisdiction on the

¹ *Annual Digest*, 1931-2, Case No. 187.

² See below, p. 256.

³ See below, p. 263.

⁴ See below, pp. 258, 261.

⁵ *Annual Digest*, 1929-30, Case No. 7.

⁶ See Guggenheim, *Lehrbuch des Völkerrechts* (1947), p. 177.

⁷ Balladore Pallieri, *Diritto internazionale pubblico* (5th revised ed., 1948), p. 290.

⁸ See *Egyptian Delta Rice Mills Co. v. Comisarta General & Co.*, *Annual Digest*, 1943-5, Case No. 27.

⁹ See *Kunglig Järnvägsstyrelsen v. Dexter & Carpenter Inc.*, as reported in Hackworth, op. cit., vol. ii, p. 479. It will be noted that in various treaties connected with the activities of its Commercial Delegations the Soviet Union had agreed that execution may be levied against its property. Thus Article 5 (8) of the Temporary Commercial Agreement of 1934 with Great Britain provided that all property of the Soviet Union was subject to seizure, with the exception of property necessary for the exercise of diplomatic or consular functions in the United Kingdom (*Treaty Series*, No. 11 (1934), Cmd. 4567). In that Treaty the Soviet Union assumed liability on contracts concluded by the Commercial Delegation or other organizations guaranteed by it. Similarly, Article 7 of the Economic Agreement annexed to the Treaty between Germany and Soviet Russia of 12 October 1925 provided as follows: 'Legal acts of the Trade Delegation consummated in Germany which are binding on the U.S.S.R. and the economic effects of these acts, shall be subject to German law and German jurisdiction. Measures of compulsory execution may also be applied to the property of the U.S.S.R. in Germany, except in so far as regards objects which, according to the general rules of international law, are required for the exercise of sovereign rights or are intended for the use of diplomatic or consular representatives in their official capacity' (*League of Nations Treaty Series*, vol. 53 (1926), p. 101). Similar treaties were concluded by Soviet Russia with Austria, Sweden, Denmark, and some other states.

merits. Undoubtedly the question of execution can arise in practice only when the foreign state possesses property within the jurisdiction. But that is not a reason for dispensing with execution whenever practicable. At least in those cases there can be no valid reason for the objection that assumption of jurisdiction is a purely nominal gesture. On the other hand, there is room for a consideration of the safeguards which may be necessary in case execution against foreign states should become the general rule. In the first instance, execution cannot properly extend to warships and vessels assimilated thereto and to diplomatic premises and to property placed there *bona fide*. Secondly, contingencies are conceivable in which seizure of the property or of the assets of the foreign state might cause friction and raise issues likely to disturb in a serious way the friendly relations with the state concerned. Accordingly, if immunity from execution is abolished in principle, it may be considered whether, on the application of the foreign state concerned, one branch of the Executive—such as the Minister of Foreign Affairs—should not be given the power to stay the execution. In that case provision would have to be made for indemnifying in some way the successful plaintiff.

2. Award of costs

It would be in line with the abandonment of the principle of immunity that, in case the foreign state appears as plaintiff and judgment is given for the defendant, courts should have the power to award costs against the state concerned and that such order as to costs should be enforceable against it. In the past, with regard to heads of states, English courts have gone so far in respecting the dignity of foreign states as to decline to award costs in favour of the successful sovereign on the ground that it would be a disparagement of his dignity to award costs to him¹—though they have awarded costs when the successful plaintiff expressly asked for them.² However, it is probable that even under the existing law costs can be awarded against a foreign state. There are instances of courts ordering foreign states to deposit security for costs in cases in which they appear as plaintiffs.³

¹ *Hullet v. King of Spain* (Dow & Clarke's Rep., p. 169).

² *Monaco v. Monaco* (1937), 157 L.T.R. 231. In England, by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 7, in any civil proceedings or arbitration to which the Crown is a party costs should be awarded in the same manner and on the same principles as in cases between subjects.

³ *The Newbattle*, 10 P.D. 33; *Republic of Costa Rica v. Erlanger* (1876), 3 Ch.D. 62. In the case of *Dollfus Mieg v. Bank of England Wynn-Parry J.* made an order for security for costs to be deposited by the United States and France who asked to be joined as defendants: [1950] 2 All E.R. 60. This, it has been stated, is the normal practice. See also to the same effect *Fuchs v. Hertford Accident & Indemnity Co.*, decided by the United States District Court, S.D.N.Y. (1950), 93 F. Supp. 926, and *Republic of Roumania v. Constantinescu*, decided in 1951 by the High

3. *Immovable property*

There is uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property.¹ Most of the relevant judicial pronouncements are *obiter*, but—probably—that circumstance emphasizes the undoubted acceptance of the rule as stated.² In laying down in any particular case that the foreign state is entitled to immunity, courts consider it necessary to make an express reservation with regard to what they consider the obvious exception, namely, actions relating to immovable property.³ However, that particular aspect of immunity is not altogether free of doubt—it is significant that there is no English decision directly supporting this exception from the principle of immunity—and its clarification would seem desirable.

4. *Questions of procedure. Service of writ. Discovery. Act of State*

The assimilation of the immunities enjoyed by foreign governments to those enjoyed by the domestic state would necessarily raise various connected questions of procedure. These cannot be discussed here in detail. They include, for instance, the question of the service of the writ. If, as in England, the governing principle is that the courts of a country have jurisdiction only over persons present within the jurisdiction, to what

Court of the Canton of Zurich and reported in *American Journal of International Law*, 45 (1951), p. 799.

¹ It is not considered necessary to add to the length of this article by a quotation of legislative provisions and judicial decisions in support of that view. A considerable number of these will be found in the comment to Article 9 of the Harvard Research Draft on the Competence of Courts in regard to foreign states.

² As Professor Niboyet says in an article entitled 'Les immunités de juridiction, en droit français, des états étrangers engagés dans des transactions privées', in *Revue générale de droit international public*, 43 (1936), at p. 534, 'La jurisprudence ne fournit pas de document, sans doute parce que tout le monde est d'accord.'

³ The complete subjection of immovable property to the jurisdiction of the state has been regarded subject to one limitation, namely, when the action concerns immovable property actually used for the purposes of the diplomatic mission. Thus in Czechoslovakia, after the Supreme Court gave judgment, in 1928, for the enforcement, in respect of a building used as the Hungarian legation, of an award of a Mixed Arbitral Tribunal rendered against Hungary, the Czechoslovak Ministry of Foreign Affairs formally gave a decision laying down that execution by means of a forced sale of the premises of a foreign legation was not in accordance with international law. The Supreme Court of Czechoslovakia gave effect to that ruling (*Annual Digest*, 1927-8, Case No. 251). In the same category there may be included the decision of the Prussian Tribunal for Conflicts of Jurisdiction where the Court refused to entertain an action aiming at the removal of the insignia of the Polish state from a building occupied by the Polish Vice-Consul: *Halig v. Polish State*, *Annual Digest*, 1927-8, Case No. 104. However, when in 1929 the Swedish ambassador in France invoked jurisdictional immunity and exemption from French legislation concerning tenancies in respect of property owned by the Swedish State and intended to be used for the purpose of the legation, the court rejected the plea to the jurisdiction. It said: 'The acquisition of real property by a foreign State does not *ipso facto* invest that property with the privileges of extraterritoriality; it is necessary that property be completely appropriated to the service of the embassy' (*Petrocchino v. Swedish State*, *Annual Digest*, 1929-30, Case No. 198). An account of a similar Italian case involving property to be used as an Embassy is given below, p. 252.

extent can the foreign state be deemed to be present as the result of the mere fact that it maintains a diplomatic or other representative in this country? If the diplomatic representative is to be the proper recipient of the writ in his capacity as the representative of the state, how can any such innovation be reconciled with the existing law prohibiting the service of a writ upon a foreign minister? To mention another example, to what extent ought foreign states, placed as they would be on a footing of equality with the domestic state, benefit from the privileges still enjoyed by the latter as in the matter of discovery of documents or limitation of actions? It would follow from the principles of the reform here envisaged that foreign states would benefit from these privileges.¹ Consideration would also have to be given to the question of 'Acts of State'. If, to limit once more the example to the position in English law, 'Act of State' covers primarily acts done by the Crown in relation to aliens abroad,² if immunity in respect of 'Acts of State' is preserved by national legislation such as the Crown Proceedings Act, 1947, and if foreign states are to be placed in the same position as the Crown enjoys under the latter Act, then the result might be that the foreign state would enjoy immunity exactly in respect of the acts with regard to which it is intended to subject it to the jurisdiction of English courts, namely, acts done in this country in relation to British subjects. A further question which would require consideration would be that of admissibility, against foreign states, of declaratory judgments—for these may, in effect, be used as a substitute for an injunction or an order for specific performance.

5. *Reciprocity as the basis of immunity*

The following are the reasons why the method of reciprocity cannot be considered as offering a satisfactory approach to the solution of the problem:

(1) In the first instance, it is probable that the adoption of the principle of reciprocity would result in a substantial degree of uncertainty in the administration of this branch of the law. Thus in order to determine whether a foreign state which has accepted, wholly or in part, the distinction

¹ In England although discovery can be ordered against foreign states appearing as plaintiffs (*King of Spain v. Hullet*, 1 Cl. & F. 333; *Rothschild v. Queen of Portugal* (1839), 3 Y. & C. (Ex.) 594; *Prioleau v. United States* (1866), 2 Equity Cases 659)—and, probably, when submitting themselves to jurisdiction as defendants—such discovery may be subject to the exemptions provided for in respect of the Crown by the Crown Proceedings Act (s. 28) and the rule laid down in *Duncan v. Cammell Laird & Co.*, [1924] A.C. 624.

² It has been suggested that *R. v. Bottrill*, [1947] K.B. 41, and *Netz v. Chuter Ede*, [1946] 1 All E.R. 628, established the proposition that 'Act of State' can also be pleaded with regard to acts—detention and deportation, respectively, of enemy aliens—taking place in England. However, it is probable that the term 'act of State' was used in these cases in its non-technical connotation. According to the United States Federal Tort Claims Act no action lies against the Government of the United States in respect of 'any claim arising in a foreign country'.

between acts *jure imperii* and acts *jure gestionis* is entitled to immunity, it would be necessary to investigate the position in that state. However, the law in most countries is far from being clear in this respect.¹ In most countries there are neither legislative provisions nor uniform or consistent judicial precedent on the subject.

(2) Secondly, if jurisdictional immunity is a principle which it is increasingly difficult to reconcile with modern developments, then the fact that the foreign state concerned grants immunity to other states would not be sufficient to justify the denial of a remedy to the individual plaintiff. The misgivings and the criticism to which the grant of jurisdictional immunity to foreign states occasionally gives rise are due not so much to any absence of reciprocity as to the fact that it is possible for a foreign state or its agency to disregard or invade with impunity rights otherwise protected by the law of the land. The adoption of the principle of reciprocity would accentuate—it would not remove—what is increasingly considered to be an undesirable situation.

(3) In so far as immunity represents a sound principle of international law—in particular in so far as it postulates that a state is not answerable to the jurisdiction of foreign courts in the matter of its legislation and similar acts of sovereignty—it must, in principle, continue to be given effect irrespective of reciprocity (though subject to the exercise of the right of retaliation in case of a violation of that principle by another state).

On general grounds reciprocity is probably an unsatisfactory instrument for securing the observance of ordinary rules of international law.² Courts do not, as a rule, make the granting of a remedy to one party conditional upon the observance by that party, on other occasions, of the legal rule *in pari materia*. Essentially, immunity from jurisdiction amounts to a denial of an otherwise available legal remedy. As such it is obnoxious. There is objection to a practice which in effect would make a court say to the plaintiff: 'We will deny you, as against a foreign state, a remedy to which you are otherwise entitled provided that the courts of the defendant state deny a remedy in similar circumstances as against our own state.'³ There are only very few countries which have applied, in some respects, the principle of specific reciprocity to questions of immunity.⁴

¹ See above, p. 223.

² See, to the same effect, the observations of Lord Porter in *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England*, [1952] A.C.

³ For an example of reciprocity in a different sphere see the United States Statute 28 U.S.C.A. 261 which provides as follows: 'Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character shall have jurisdiction.'

⁴ See above, p. 242, and below, p. 258, as to Switzerland and other countries in the matter of execution.

6. *Availability of remedies within the state seeking immunity*

If the considerations adduced in this article as militating against the principle of jurisdictional immunity of foreign states are valid, then, it is submitted, their force is not decisively affected by the circumstance that the remedy sought by the plaintiff is available within the foreign state seeking immunity. Such remedy, which deprives the plaintiff of the natural and proper forum, may be for him costly and impracticable. It may, on occasions, be purely nominal or incomplete. The courts whose jurisdiction is sought would be burdened with the difficult task of determining the existence and the degree of reality of the purported remedy within the state claiming immunity.

VI. *Abolition of immunity by way of international agreement*

Reasons have been given why the solution of the problem of jurisdictional immunities of foreign states by way of assimilation of their position to that of states under the rule of law which have substantially renounced their own immunity before their courts would not be inconsistent with any basic principle of international law or with the requirements of friendly international intercourse. Moreover, a solution of that nature, circumscribed by clear and specified exceptions, would free international law of a subject-matter which has occupied a large and disproportionate place in the activities of municipal courts and which, because of its essential insignificance, has tended to infuse an element of artificiality into international law. If that solution is adopted, it will no longer be necessary to give continued attention to such questions as the relevance of the peacefulness and legality of the possession exercised by the foreign state, the importance to be attached to the declaration by the foreign state as to the ownership or possession of the subject-matter of the action, the intricate questions connected with the nature of possession, the subtleties of the relation of the state to its departments, the limits of waiver, and many others. It is a disquieting reflection upon the reality of the law of nations that in many countries most of the decisions of their courts relating to international law are concerned, in some form or other, with immunities of foreign governments and their representatives.

However, while it is probable that the example of states which have abolished their own immunity within their borders may provide the initial impetus for freeing international law, by way of municipal legislation, of the shackles of an archaic and cumbersome doctrine of controversial validity and usefulness, it is clear that such unilateral method of reform cannot, in the long run, provide a final solution.¹ For the doctrine of

¹ Reference may be made in this connexion to a passage—which is illuminating by its very hesitation—in Professor Hyde's weighty treatment of the subject. He says: 'While the individual

jurisdictional immunity of foreign states has been generally considered—judicially and otherwise—to form part of international law. It is in the long run undesirable that the modification of any such doctrine should take place by way of national action which is unilateral, sporadic, and uncoordinated. The resulting lack of uniformity would be bound to contribute to friction and confusion. For these reasons the alternative of bringing about any reform in this field of international law by way of international agreement and concerted scientific effort aiming at a codification of the subject merits attention. The topic of jurisdictional immunities of states is among those which the International Law Commission has included within its programme of *codification*. A detailed study and discussion by that body may provide a much needed clarification of the subject by reference to the practice of governments and courts. There is, in this matter, no such divergence of national interests or deeply rooted peculiarities or traditions of national jurisprudence as to hamper the Commission in the impartial, harmonious, and effective fulfilment of its exploratory and codifying task.

It may be useful, at this stage, to emphasize these two aspects of the problem. In the first instance, it is becoming increasingly clear that the maintenance of immunity is not necessarily in the obvious interest of any particular state or group of states. There is probably no substance in the view—and in the fear—that once the restraints of the doctrine of immunity are abandoned states with world-wide interests may be confronted with a flood of petty and vexatious actions and extortions in foreign countries. The ordinary remedies of international law, including those of retaliation, as well as special remedies outlined elsewhere in this article,¹ may provide in most cases a substantial safeguard against any such possibility of abuse. It must also be borne in mind that states with wide commercial interests abroad are adversely affected, in the persons of their nationals, by the rule of immunity. This fact explains why government departments and organized economic interest of states whose courts still adhere to the rule of immunity have favoured its relinquishment. Moreover, the existing practice provides no firm safeguards against abuse. It is implicit in the still predominant distinction between acts *jure gestionis* and acts *jure imperii* that it involves, in principle, the negation of the principle of immunity. For, in consequence of it, the state is submitted in the first instance to foreign jurisdiction which determines by reference to its own rules—for there are no rules of international law on the subject—whether the act in question is *jure imperii* or *jure gestionis*.

State may not by legislative enactment lessen the requirements of international law and thereby rid itself of an obligation to accord an exemption which the law prescribes, it may by such process not improperly express its own view concerning either what these requirements are or what they should be' (*International Law* (2nd ed., 1945), vol. ii, p. 839).

¹ See above, p. 241.

Secondly, care must be taken not to permit the inquiry to be stultified from the outset by the facile assumption—which international lawyers have occasionally been prone to make in other fields—that there is in this matter a clear division between two opposing systems or schools of jurisprudence: the ‘continental’ (which has abandoned or is in the process of abandoning the principle of absolute immunity) and the ‘Anglo-American’ (said to adhere to it steadfastly). The survey attached as an Appendix to this article shows that this is not the case. The courts of France, Holland, Germany, and other ‘continental’ countries have on occasions given their imprimatur to the doctrine of absolute immunity; according to some, they are still wedded to it. While in the United States and the United Kingdom the courts have adhered to the principle of absolute immunity with a certain rigidity, they have done so largely for reasons, the basis of which has disappeared, connected with the historic position of the executive and, in the United States, of states members of the Union. They have done so in opposition to the principle, which has gradually asserted itself in the domestic sphere, of the submission of the executive to the rule of law. As will be shown, there are clear indications in some recent decisions of American and English courts either of deliberate hesitation in applying the doctrine of immunity or of its indirect curtailment by way of circuitous avenues of the dialectics of the rules of possession and the like.¹

Undoubtedly, the field to be surveyed is wide. The practice of some states is contradictory or inconclusive; that of others inarticulate or unrecorded. Around the problem of immunities there has accumulated a cobweb of phrases which have a powerful appeal inasmuch as they touch upon some apparently fundamental qualities of statehood and a seemingly well-established practice. On the other hand, there are but few subjects in which economic and social factors and the general progression towards the rule

¹ Sir Eric Beckett has stated, in connexion with the examination of this subject by the Institute of International Law in 1951, that ‘the amount of State immunity awarded by English courts at present is somewhat wider than is required by the principles of international law and is perhaps wider than is desirable’ (*Annuaire*, 1952). With this there may be compared the following observation of Sir Robert Phillimore in *The Charkieh* (1873), L.R. 4 A. and E., at p. 99: ‘No principle of international law, and no decided case, and no dictum of jurists of which I am aware has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.’ That observation expressed the gist of Sir Robert Phillimore’s judgment in that case. The same applies to his decision, overruled by the Court of Appeal, in *The Parlement Belge* (see below, p. 271). It is of interest to note that, at the time when the Court of Appeal in that case laid the foundations of the rigid doctrine of absolute immunity of foreign states in English law, the doctrine was repudiated, in judgments of great power and learning, by a Judge who was the leading English international lawyer of his time. In comparison there is but limited persuasive force in the emphatic, though characteristically nebulous, references of the Judges of the Court of Appeal in *The Parlement Belge* to considerations of international comity and courtesy and independence, or equality or dignity—or all of them—as the basis of the doctrine of immunity.

of law within the state provide a more compelling opportunity for a re-examination and eventual removal of what is widely and increasingly considered to be an anomaly. Even if the results of the work of the International Law Commission on the subject do not ripen into an international convention or conference, they are nevertheless bound to be of influence by throwing authoritative light on the question whether the doctrine of immunity of foreign states is an artificial encumbrance which has been thriving uneasily on a spuriously conceived notion of the dignity and independence of states or whether it corresponds to the practical needs of international society and to essential and inescapable legal qualities of its constituent members.

APPENDIX

JUDICIAL PRACTICE IN THE MATTER OF JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

The purpose of this article has been to discuss the question of jurisdictional immunities of foreign states from the point of view of the legal possibility and desirability of the abolition, subject to specified exceptions and safeguards, of the principle of absolute immunity and its replacement by rules which are more in conformity with modern developments. The estimate generally accepted of judicial practice on the subject is that while in a small number of states courts have acted upon the distinction between acts *jure imperii* and acts *jure gestionis* the courts of the majority of states are still wedded to the principle of absolute immunity.¹ That estimate is believed to be

¹ In many continental countries the distinction between the two kinds of acts has been familiar in constitutional law in connexion with the question of judicial control over the Executive. Thus in France, where the civil and tortious responsibility of the state and its servants is generally admitted, there was current for a prolonged period a legal doctrine according to which *actes de puissance publique* were subject to the jurisdiction of administrative tribunals while *actes de gestion publique* fell within the competence of ordinary courts. The determination of the border-line between these two categories of acts became subsequently the subject of controversy and of a conflicting practice of courts, with the result that it has now been abandoned and the conception of *service publique* substituted for that of acts *jure imperii*. However, the original distinction was widely accepted for a time and that fact explains to some extent the ease with which it has been adopted in the altogether different sphere of the jurisdictional immunities of foreign states. This was also the case in Italy.

In England that distinction has been discussed by courts occasionally, though not *eo nomine*, in connexion with the question whether trading activities of foreign states are—or ought to be—entitled to the privileged treatment accorded to the activities of the state normally associated with its public functions as a sovereign state. In particular it was discussed in *The Cristina*, [1938] A.C. 485, where the immunity of foreign public vessels engaged in commerce was subjected to judicial criticism in a way which made it doubtful whether it would have been conceded in that case if the House of Lords had come definitely to the conclusion that the vessel in question was not *publicis usibus destinata*. It may be noted that, in a different sphere, English courts have considered a similar distinction with regard to the statutory duties of public corporations. Thus in *Bradford Corporation v. Myers*, [1916] 1 A.C. 242, the House of Lords discussed the distinction, for the purposes of the Public Authorities Protection Act, 1893, between acts done in discharge of a public duty (or exercise of a public authority) and other transactions. They held that, while the supply of gas to the inhabitants of the district was an act in discharge of a public duty, the sale and supply of coke produced in the manufacture of the gas was not a transaction of that nature. In *Western India Match Co. v. Lock*, [1946] K.B. 601—a case arising out of the negligent unloading of a ship requisitioned by the Minister of War Transport and operated under charter to him—the Court discussed that distinction in relation to the question whether the case before it was in

inaccurate. As will be shown in the survey which follows, in the great majority of states in which there is an articulate practice on the subject courts have declined to follow the principle of absolute immunity. It is convenient to begin with the countries in which the distinction between acts *jure gestionis* and acts *jure imperii* has found unqualified acceptance in the sense that immunity is accorded in respect of the latter but denied in respect of the former. The following Table may facilitate reference to the countries covered by this survey:

Austria, p. 257.	Latin-American countries, p. 265.
Belgium, p. 253.	Poland, p. 259.
Egypt (Mixed Courts), p. 255.	Roumania, p. 256.
Eire, p. 259.	Russia, p. 259.
France, p. 260.	Scandinavian countries, p. 264.
Germany, p. 266.	Switzerland, p. 257.
Greece, p. 256.	United Kingdom, p. 270.
Holland, p. 263.	United States of America, p. 268.
Italy, p. 251.	

Italy. Italy is foremost amongst the states which have acted upon the distinction between acts *jure imperii* and *jure gestionis*. A typical case illustrating the length to which Italian practice goes in this respect is the case, decided in 1925 by the Court of Cassation, of *Storelli v. Governo della Repubblica francese*¹ in which the Court assumed jurisdiction in an action by an Italian merchant against the French Government for goods sold and delivered to an aviation base maintained by that Government at Gallipoli (at that time Italian territory). The theory underlying the judgment of the Court was that of implied consent deduced from the fact of having entered into a series of transactions of a private law nature.

However, the Italian practice based on the distinction between acts *jure gestionis* and acts *jure imperii*—which is not necessarily identical with the fiction of implied consent—had been formulated, with some clarity, forty years before. That distinction was acted upon in 1886 when the Court of Cassation assumed jurisdiction in respect of an action concerning services rendered for the Bey of Tunis.² In the same year the Court of Cassation rejected the plea of state immunity put forward by the Greek consul acting on

the nature of carriage of freight by way of a private contract or, as it eventually held, whether the Minister acted in the public interest. The distinction between actions brought against the King in his private and in his public capacity is still recognized in English law. The former is still governed by the rules of petition of right as they existed before the Petitions of Right Act, 1860 (see ss. 39 (1) and 40 (1) of the Crown Proceedings Act). American courts have had frequent occasion to invoke that distinction in connexion with immunities of states members of the Union and otherwise. Thus, in *Bank of United States v. Planters' Bank of Georgia*, the Supreme Court said (significantly *per* Chief Justice Marshall, who used similar language in *The Schooner Exchange v. MacFaddon* when distinguishing between the private property of a Prince and 'any portion of that armed force which upholds his crown'): 'It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen' ((1824), 9 Wheaton 904). Similarly, in *South Carolina v. The United States*, the Supreme Court distinguished between state agencies 'of a strictly governmental nature' and those 'which are used by the State in the carrying of an ordinary private business' ((1905), 199 U.S. 437). In the Massachusetts case of *Oliver v. Worcester*, Mr. Justice Grey said: 'The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public' (102 Mass. 488, 489).

¹ *Rivista di diritto internazionale*, 17 (1925), p. 236; *Annual Digest*, 1923-4, Case No. 66.

² *Gutierrez v. Elmilik, Foro Italiano*, i (1886), pp. 920, 922.

behalf of his government in a suit for the payment, in accordance with a contract made by the Consul, of the expenses of maintenance of a Greek subject in a municipal asylum. The Court said in that case:

'... No one can deny that the foundation of international law is [the principle of] the sovereignty and independence of States; and that in consequence of this principle each State, in the exercise of its powers, is exempted from the jurisdiction of other States. But the fallacy consists in considering the State exclusively and always as a body politic, although its activity as a civil entity cannot be gainsaid when it performs acts acquiring rights and assuming obligations in private relationships, like any other physical or juristic person being capable of exercising civil rights.'¹

In 1928 the Court of Cassation assumed jurisdiction in an action brought against the Mexican ambassador in connexion with a contract for the purchase of property to be used as Embassy buildings. It said:

'It seems quite arbitrary to derive a claim of jurisdictional immunity in favour of foreign States for all their activities in foreign territories from the fact that, to a certain extent, there exists a privilege of immunity in favour of their ambassadors or ministers plenipotentiary. For if it is true that the foreign States having a mission abroad can avail themselves of the privilege of exemption from the local jurisdiction with regard to matters of international relations of public law, it is similarly true that a foreign State cannot claim immunity from jurisdiction in another State when juridical relations have been created in the territory of that State which are in no way connected with the above-mentioned international relations in the domain of public law. Neither can immunity be claimed on account of the fact that the legal relations in respect of which immunity is claimed have been entered into by a person who at that time was exercising functions of diplomatic character.'²

The Court of Cassation adopted the same attitude in relation to matters connected with the activities of the Russian Trade Delegation and, generally, of the commercial activities of the Russian state. Thus it assumed jurisdiction in an action brought by an Italian firm against the commercial representative of the Russian Government. The firm asked for an injunction restraining the commercial representative from disposing of silk cocoons forming the subject-matter of a contract concluded between the parties. The Court rejected the plea of immunity put forward by the respondent. It did so by reference to the theory of implied waiver of immunity on the part of a state engaging in commercial activities in a foreign country.³

In 1936 the Court of Appeal, in the case of *De Semenoff v. Railway Administration of the Norwegian State*,⁴ assumed jurisdiction in the matter of a contract of employment between the plaintiff and an agent of the Norwegian Railway Administration.

¹ *Typaldos, Console di Grecia v. Manicomio di Aversa*, *Giurisprudenza Italiana*, 1886, Pt. i, pp. 228, 229, as translated in the comment to Article 11 of the *Harvard Research Draft*, p. 623.

² *Perruchetti v. Puig y Cassauro*, *Foro Italiano*, 1929, i, pp. 112 ff.; *Rivista di diritto internazionale* 20 (1928), pp. 521-7; *Annual Digest*, 1927-8, Case No. 247.

³ *Rappresentanza commerciale dell'Unione delle repubbliche sovietiste socialiste v. Ditta Tesini e Malvezzi*, *Monitore dei Tribunali*, 66 (1925), p. 604; *Foro Italiano* (1925), i, p. 830, at pp. 833-4, 835.

⁴ *Rivista di diritto internazionale*, 29 (1937), p. 224; *Annual Digest*, 1935-7, Case No. 92. On the other hand, the Court of Cassation in 1933 declared Italian courts to be incompetent in an action for wrongful dismissal brought against the Russian Trade Delegation. It did so on the ground that 'trading abroad is regarded by the Russian State as a function of an essentially public character' and that 'it is so treated by the internal ordering of that State under which there is established in this respect, by the Constitution itself, a monopolistic régime, controlled by a People's Commissar' (*Russian Trade Delegation in Italy v. Kazmann*, *Annual Digest*, 1933-4, Case No. 69). The somewhat contradictory practice of Italian courts in the matter of international

While Italian courts have assumed jurisdiction over foreign states in matters of a 'private law nature' they have declined to do so with respect to acts *jure imperii*. Thus in *Little v. Riccio*,¹ decided in 1934, the Court of Appeal and the Court of Cassation declined jurisdiction in an action for dismissal brought against a committee responsible for the maintenance of the British cemetery at Naples. In that case the British Consul intervened on the ground that the cemetery was the property of the British Crown. It was held by the Court of Appeal that the 'cemetery was the property of the State of Great Britain, which desired to give protection to its subjects also after their death by providing a place of burial according to their religion' and that 'this was surely a public law function, over the performance of which the Italian State could not exercise jurisdiction, as otherwise the political sovereignty of a foreign State would be infringed'. On further appeal the Court of Cassation held that the Italian courts had no jurisdiction. The cemetery, it held, was maintained by Great Britain *jure imperii* for the benefit of her nationals as such, and not for them as individuals.

Belgium. Belgian courts have consistently refused to grant immunity with regard to acts *jure gestionis*. They have declined to do so with regard to the operation of railways,² trading monopolies,³ purchasing of arms and munitions,⁴ and selling excess supplies.⁵ That attitude found clear expression in 1879 when the Ghent Court of Appeal held that it had jurisdiction in a case involving the guano monopoly of Peru and in which the respondents were the agents of Peru.⁶ Belgian courts have gone to the length of assuming jurisdiction in actions connected with the issue of a public loan by the defendant state. Thus, in an action against a member state of the Federal State of Brazil, the Court of Appeal of Brussels said in 1907:

'Attendu que l'indépendance réciproque des États souverains exige, il est vrai, que l'acte souverain d'un État ne puisse être jugé par un autre; mais que cela revient à rechercher si l'acte, dont les conséquences sont soumises aux tribunaux, émane de la souveraineté de l'État étranger ou relève du droit civil, — s'il a été accompli par le souverain ou par une entité exerçant des droits privés.'⁷

The most elaborate exposition, by reference to general and doctrinal considerations, of the reasons militating in favour of assumption of jurisdiction in matters *jure gestionis*

contracts of service of public foreign corporations—for a summary of some of these cases see *ibid.*, p. 179—is of interest inasmuch as it indicates that such contracts may be considered as lying outside the scope of ordinary private law transactions. That, as is shown later, is the view of French courts. It is also in accordance with the view, obtaining in England, as to the nature of the employment of civil servants by the Crown. It is possible that, as indicated by the Rome Court of Appeal in the *De Semenoff* case, the refusal to assume jurisdiction in actions relating to the contracts of service of the Russian Trade Delegation was due to the fact that the Treaty of 1924 invested the Delegation with a diplomatic character. In general, however, Italian courts did not hesitate, apart from the provisions of the Treaty of 1924 which exempted from execution goods covered by transactions entered into with the Russian Trade Delegation, to subject to Italian jurisdiction contracts concluded by the Delegation. A detailed exposition of that view will be found in the decision of the Court of Cassation, given in 1935, in the case of *Russian Trade Delegation v. Castro* (*Annual Digest*, 1933-4, Case No. 70).

¹ *Giurisprudenza Italiana*, 86 (1934), i, col. 976; *Annual Digest*, 1933-4, Case No. 68.

² *Société anonyme des chemins de fer Liégeois-Luxembourgeois v. État néerlandais*, *Pasicrisie Belge*, 1903, vol. i, p. 294.

³ *Peruvian Guano Co. v. Dreyfus in Pasicrisie Belge*, 1881, vol. ii, p. 313.

⁴ *Société pour la fabrication des cartouches v. Col. M., Ministre de la Guerre de Bulgarie in La Belgique judiciaire*, 1889, p. 383.

⁵ *Gouvernement Ottoman v. Gaspari in Pasicrisie Belge*, 1911, vol. iii, p. 104.

⁶ *Rau, Vanden Abeele et Cie v. Duruty* (1879), *Pasicrisie Belge*, vol. ii, pp. 175, 176.

⁷ *Feldman v. État de Bahia*, *Pasicrisie Belge*, 1908, vol. ii, pp. 55, 57-58.

will be found in the decision, given in 1903 by the Belgian Court of Cassation, in which, in setting aside the judgment of the Court of Appeal, it affirmed the jurisdiction of Belgian courts in an action against Holland in respect of work executed for the enlargement of a Dutch railway station.¹

Belgian courts adopted the same attitude with regard to actions brought against the French Government and arising out of the sale of goods to a French governmental agency for the work of reconstruction in territory devastated by the war: *Monnoyer et Bernard v. État Français*.² The case is of special interest inasmuch as, having regard to the nature of the contract in question, there may have been some substance in the claim of the defendant state that the case was one of a transaction *jure imperii*. In holding that it had jurisdiction the Court said:

'Even if it were true that the French Government acted as a public organ when it assumed by the Act of 6 August, 1917, the initiative towards industrial reconstruction in the invaded regions . . . nevertheless, in seeking to accomplish this end after the war, the French State was compelled to make purchases of raw materials, machinery, etc., . . . In transactions of this kind there can be no question of the power of a public organ, and the State can only act in the capacity of a private individual. And when, in this capacity, the State, after treating the other contracting party on an equal footing, wishes to have a dispute determined, or has itself been guilty of a breach of the contract, not coming within the head of public policy, a case exists raising questions of municipal law and solely cognisable by the courts in accordance with Article 92 of the Constitution.'

On the other hand the Brussels Court of Appeal held, in 1937, that it had no jurisdiction in an action against the appellants against whom an action was brought in their capacity as agents of the Spanish Government which had requisitioned ships during the civil war. The Court said: 'Requisitions made by a government in time of war are undoubtedly acts of a public character.'³ Similarly, in 1934 a Belgian Court decided that it had no jurisdiction in an action brought against the Canadian Immigration Office at Antwerp for breach of a contract of employment. The Court held that the Immigration Office of Canada was a branch of public service, and that the Canadian Government in engaging the plaintiff as its employee was acting as a sovereign state and not as a subject of private law. Belgian courts had no jurisdiction over acts of foreign states of a political or governmental nature; in particular, they had no jurisdiction in respect of an action brought by an agent of a foreign government for wrongful dismissal.⁴ The position of Belgian courts in the matter of public bonds is clearly illustrated by the case of *Brasseur and Associates v. Republic of Greece* decided in 1933 by the Court of Appeals of Brussels. This was an action by holders of the bonds of the Salonica-Monastir Railway Company against the Greek state in consequence of a Greek Decree cancelling 80,000 of the bonds which Greece had taken over in 1925. The Court declined jurisdiction inasmuch as it held that the cancellation of the bonds of the Salonica-Monastir Railway which in 1917 were in the possession of German nationals was a political act and that Belgian courts were not competent to examine its legality. On the other hand, the Court held that it had jurisdiction in so far as the action raised

¹ *Société anonyme des chemins de fer Liégeois-Luxembourgeois v. État néerlandais (Ministère du Waterstaat)*, *Pasicrisie Belge*, 1903, vol. ii, pp. 294, 301-2.

² (1927), *Pasicrisie Belge*, vol. iii, pp. 129, 130; *Annual Digest*, 1927-8, Case No. 112.

³ *Urrutia v. Martiarena*, *Annual Digest*, 1935-7, Case No. 94.

⁴ *Époux Perevostchikoff v. State of Canada*, *Pasicrisie Belge*, 1936, vol. iii, p. 37; *Annual Digest*, 1938-40, Case No. 85. By way of contrast it may be noted that in 1906 an Italian Court assumed jurisdiction in an action brought against a state member of the Brazilian Federation and arising out of a contract for publishing a magazine for the purpose of promoting emigration to Brazil: *Somigli v. State of Sao Paulo of Brazil*, *Revue de droit international privé*, 1910, p. 527.

an issue *jure gestionis*, namely, in so far as the plaintiffs, without questioning the legality of the decree cancelling the bonds, confined themselves to the assertion that their bonds did not fall within the scope of the decree. In the view of the Court, the Greek Government, in denying the latter contention, was not acting as a political authority. It was merely expressing an opinion as to the application of a general order to a particular case and as to the existence or non-existence of a debt for which it was liable *jure gestionis*. The Greek state 'was thereby acting like any private person who was called upon to pay a sum claimed in virtue of a bond entitling the holder to payment and who considered that he was under no obligation to pay the sum and defended the action brought against him'.¹

Egyptian Mixed Courts. Although the Mixed Courts of Egypt came to an end in 1949, the consistent attitude of these courts for nearly half a century, in assuming jurisdiction in actions *jure gestionis*, is of special interest in view of their international composition. Thus Egyptian Mixed Courts assumed jurisdiction in an action against the Palestine State Railways Administration notwithstanding the plea that it was a state organ and immune from liability. The Court held that in conducting a railway undertaking the Government of Palestine was performing an act of administration and not of sovereignty. By making the contract of carriage it had entered the sphere of private law; in view of the fact that the contract was to be performed in Egypt, the Mixed Courts had jurisdiction.² In 1943, in the case of *Egyptian Delta Rice Mills Co. v. Comisaría General de Madrid*, the Commercial Tribunal of Alexandria held that it had jurisdiction in an action arising out of a purchase of rice by what was described as an organ of the Spanish state. The reasoning of the Court, referring as it does to a transaction intended to secure the supply of food for a neutral state in time of war, is significant inasmuch as it refers both to the question of merits and to execution. The Court said:

'It is not contended in the present case that the rice in question was bought by the *Comisaría General* for the needs of the Spanish public services. On the contrary, it seems clearly established that the rice was bought for the feeding of the Spanish population during a difficult period. In negotiating this purchase herself, instead of leaving the matter to private enterprise, Spain proceeded in much the same manner as any other Spanish trader would have done who wanted to buy rice in Egypt: that is to say, she got it out of Egypt with the necessary permits and carried it to Spain in a Spanish ship in order to re-sell it on the usual commercial lines. This being so, the *Comisaría General* cannot claim immunity from jurisdiction, and the judgment entered against it must be confirmed.

'As regards the execution of the judgments, although a foreign State can claim immunity from execution, this immunity applies only where the execution takes place on the territory of that State or when the assets which it is proposed to attach are held by the State in virtue of its character as a public authority. On the other hand, where, as in the present case, the assets which are the object of the execution are on Egyptian territory and are in fact funds which belong to the *Comisaría General* not as a public authority but as the directing power over a group of undertakings, all of a commercial character, the execution must be authorized.'³

The reasoning of the Mixed Court of Appeal in a case which raised the issue of

¹ *Pasicrisie Belge*, 1933, vol. ii, p. 197; *Annual Digest*, 1931-2, Case No. 85.

² *In re Palestine State Railways Administration*, *Annual Digest*, 1919-42, Suppl. Volume, Case No. 78.

³ *Bulletin de législation et de jurisprudence égyptiennes*, 55 (1942-3), p. 114; *Annual Digest*, 1943-5, Case No. 27.

jurisdiction, in the matter of a collision, against the captain of a government-owned British ship was equally emphatic.¹

On the other hand, the Mixed Courts of Egypt declined jurisdiction in cases clearly involving 'acts of sovereignty'. Thus, in 1948, the Mixed Court in Alexandria refused jurisdiction in an action against the Greek state for injuries sustained in a collision with a Greek army truck. The truck, the Court said, was operated by the state in its sovereign capacity: 'The theory and the practice of the Mixed Courts, adopting the modern tendency which limits the absolute immunity of States, . . . has always distinguished between acts of sovereignty or political acts and acts of commerce (*gestion*) or administration which relate to the private domain, retaining jurisdiction only in the latter instance.'² This was also the reasoning of the Court in *Hénon v. Egyptian Government and British Admiralty*, a case decided in 1947 by the Civil Tribunal of the Mixed Courts in respect of a villa requisitioned by the Military Governor of Cairo for the use of British forces in Egypt.³

Greece. Greek courts have assumed jurisdiction in actions involving state activities *jure gestionis*. Thus, in an action against the Soviet Government, the Court of Athens went to the length of upholding a distraint upon the property of the Russian Government. It said, in a decision given in 1928:

' . . . when the [Soviet] Union chooses to act as the vendor of goods, it assumes the character of an *entrepreneur*, undertakes an ordinary piece of civil business, and enters into a contract at municipal law. Its relations become then cognisable by the Greek courts, since the claimant is a Greek national invoking this jurisdiction to settle the question at issue. It must also be noted that by virtue of the contract the Union has voluntarily submitted to Greek jurisdiction.'⁴

In 1931, while declining jurisdiction in a case of distress levied for rent of the premises occupied by the British Consul-General in Athens, the Court of Athens observed that a foreign state does not enjoy jurisdictional immunities with regard to acts of a private-law nature such as contracts of sale, relations of landlord and tenant, lending of money, &c. However, it held that the renting of premises for the purposes of consular service was an act of a public character connected with the exercise of sovereign rights and as such immune from jurisdiction.⁵ In 1949 the Court of Appeals of Athens not only affirmed its jurisdiction in matters of *jure gestionis*. It declared such jurisdiction to extend to execution, including—apparently—execution resulting in the expulsion of a diplomatic representative from premises occupied by him.⁶

Roumania. Prior to the Second World War the courts of that country were among those which assumed jurisdiction with regard to acts *jure gestionis*. Clear expression was given to that attitude in 1920 in a case, involving the supply of cigars, against the Polish Tobacco Monopolies administered by the Polish Ministry of Finance.⁷

¹ *Capitaine Hall v. Capitaine Zacarias Bengoa* (Cour d'appel mixte, Alexandria, 1920), *Bulletin de législation et de jurisprudence égyptiennes*, 33 (1920-1), pp. 25, 26.

² *Aboutebout v. État Hellénique*, as reported in *American Journal of International Law*, 44 (1950), p. 420.

³ *Bulletin de législation et de jurisprudence égyptiennes*, 59 (1946-7), p. 225; *Annual Digest*, 1947, Case No. 28.

⁴ *Soviet Republic (Immunity in Greece)* case, *Themis*, vol. 40, p. 486; *Annual Digest*, 1927-8, Case No. 109.

⁵ *Consular Premises (Greece)* case, *Annual Digest*, 1931-2, case No. 187.

⁶ Decision No. 1690/1949: reported in *Revue hellénique de droit international* (1950), p. 331.

⁷ The Court said: 'Considérant que tout État doit être considéré sous deux aspects comme

Austria. Although for a short period Austrian courts declined to assume jurisdiction over foreign states in matters *jure gestionis*, that country must now be regarded as upholding the right to exercise such jurisdiction. Thus, in 1919, the Supreme Court assumed jurisdiction in a case by the Austrian-Hungarian Bank against Hungary. It said: 'It can be assumed that local jurisdiction may be invoked against a foreign State for the determination—and also for the enforcement—of such claims to be performed within the country concerning which the foreign State appears in consequence of a relationship of a purely private-law nature.'¹ This was also the attitude of the Supreme Court in Civil Matters in a case decided in 1920 and arising out of an action against a foreign state, represented by its ambassador, in connexion with contracts concluded by him for the execution of works in the Embassy building.² A similar view was expressed, *obiter*, in the *Foreign States (Legation Buildings) Immunities* case, decided in 1928 by the Supreme Court, where the Court declined jurisdiction in an action against the Czechoslovak Republic in respect of an accident in the building of the Czechoslovak Legation in Vienna. The Court said:

'The Court is not prepared to accept the more extreme view that, having regard to the indivisibility of State sovereignty, a State can never be subjected to the jurisdiction of the foreign court, regardless of the fact whether the dispute arises out of the exercise of its sovereign rights or of its activity as the subject of private law, or whether it subjects itself expressly to the jurisdiction of the foreign court. However, in regard to the building in which the plaintiff met with an accident, the defendant State is subject to Austrian jurisdiction only in so far as the case affects the immovable property itself or any contract relating thereto.'³

In 1950, in an elaborate judgment in the case of *Hoffmann v. Dralle*, the Austrian Supreme Court after reviewing at length the practice of Austrian and foreign courts as well as opinions of writers came to the conclusion that: '(1) foreign States are entitled, according to international law, to exemption from the jurisdiction of municipal courts only in respect of acts performed in the exercise of the sovereign power appertaining to them; (2) also, according to municipal law, foreign States are subject to national [Austrian] jurisdiction in all disputes arising out of private law relationships.'⁴ In this case an injunction was sought and granted, in connexion with certain patent rights, against the Czechoslovak state in respect of an industrial undertaking, a cosmetics factory, taken over and operated by that Government.

Switzerland. That country must be included among those which assume jurisdiction over foreign states with respect to acts *jure gestionis*. Such jurisdiction includes actions concerned with public loans. Thus in an action against the Austrian Treasury by a

conséquence de ses besoins et de ses obligations: (a) l'État qui fait des actes publics, des actes de souveraineté, de gouvernement, *jure imperii*, conséquence des besoins politiques et (b) l'État qui fait des actes civils, des actes de gestion, achète, vend, fait toute espèce de transactions *jure privato* comme conséquence des grandes attributions et des exigences de l'État moderne, cette dernière activité ayant pour effet que l'État ne se distingue pas d'un particulier; le critérium de la distinction de tels actes étant de les considérer d'après leur nature et non d'après le but qu'ils poursuivent'; *Banque roumaine de commerce v. État Polonais*, *Revue de droit international privé*, 19 (1924), p. 581.

¹ *Österreichisch-ungarische Bank v. Ungarische Regierung*, *Niemeyer's Zeitschrift für internationale Recht*, 28 (1920), p. 506.

² *Immunities (Foreign State in Private Contracts)* case, *Annual Digest*, 1919-22, Case No. 79.

³ *Decisions of the Austrian Supreme Court in Civil and Administrative Matters*, vol. x (1928), No. 177, pp. 427-9; *Annual Digest*, 1927-8, Case No. 113.

⁴ Judgment of 10 May 1950: Ob. 167/49; Ob. 171/50. The Judgment is summarized by Dr. Abel in *International Law Quarterly*, 3 (1950), pp. 576-9.

holder of Austrian treasury bonds the Federal Court overruled a plea to its jurisdiction. In that case the Austrian Court had agreed to repay in Swiss currency bonds purchased by Swiss nationals in Switzerland. After reviewing the practice of courts of various countries on the subject the Federal Court said: 'In view of this legal situation, the extension of Swiss jurisdiction over the facts in the instant case can unhesitatingly be affirmed. The legal relationship created between the Austrian States and the bondholders, through the issue of the treasury bonds in question, belongs to the domain of private law.'¹ Moreover, it appears that Swiss courts, acting in conformity with the relevant Swiss legislation,² admit execution against the property of foreign states. Thus in 1937 the Court of Zürich allowed the attachment of the assets belonging to the Roumanian state and deposited with the Swiss National Bank. The attachment was ordered in execution of an award given by the German-Roumanian Mixed Arbitral Tribunal. The Higher Court of Zürich then issued a decree ordering the attachment and the summons for payment to be served upon the Roumanian Government through the diplomatic channel. The decision was reached after a detailed review of previous judicial pronouncements in the matter of execution against foreign states.³

In 1938 the Federal Tribunal dismissed an appeal against orders blocking the assets of the Yugoslav state in various Swiss banks. The orders were issued at the instance of a holder of a number of bonds issued in 1895 by the kingdom of Serbia. The appellants relied, *inter alia*, on the argument that Swiss courts had no jurisdiction for the reason that a loan floated by a state was in the nature of an act of sovereignty and not in the nature of a private-law transaction. The Federal Court, while denying the absolute nature of immunity in respect of public loans of a state, dismissed the appeal on the ground that it was lodged too late.⁴

In yet another case, decided in 1940, the Higher Court of Zürich, although it revoked an order of attachment of the property of Austria (then represented by Germany), laid down the principle that attachments of the property of foreign states were permissible if the claim arose out of transactions of a private law nature and if the place of performance was in Switzerland. While, in the view of the Court, the first condition was fulfilled in the case before it—the case arose out of certain transactions of the Austrian Tobacco Monopoly which was a branch of the Austrian Treasury—the second condition was not.⁵

¹ *K. k. Österreich. Finanzministerium v. Dreyfus, Entscheidungen des Schweizerischen Bundesgerichtes*, 44 (1918), pp. 49, 54–55.

² See above, p. 242.

³ *State Immunity (Switzerland) (No. 1) case, Blätter für Zürcherische Rechtsprechung*, 37 (1938), p. 319; *Annual Digest*, 1941–2, Case No. 60.

⁴ *Sogefrin S. A. v. State of Yugoslavia, Annual Digest*, 1941–2, Case No. 61, p. 234.

⁵ *State Immunity (Switzerland) (No. 2) case, Annual Digest*, 1941–2, Case No. 62. The attitude of the Swiss courts found emphatic expression in the views submitted by the Swiss Government in 1928 in connexion with the consideration of the matter by the League of Nations Committee of Experts on the Progressive Codification of International Law. It expressed the opinion that an international regulation of the subject in the direction of limiting the immunity of foreign states was desirable and that it did not present any insurmountable difficulty. It made constructive suggestions for overcoming what it considered the principal difficulty surrounding the matter, namely, the distinction between acts *jure gestionis* and *jure imperii*. It said: 'As regards the criteria to be employed in distinguishing between acts of sovereignty and acts of simple business administration in the event of jurisdictional immunity being recognized only for acts which are genuine manifestations of sovereignty the solution most in harmony with the principles of judicial practice would be to conform entirely not to the definite purpose of the act but to its intrinsic nature. Before an act can have the character which confers full jurisdictional immunity upon it, it must be of such a nature that it cannot be performed by a private individual' (Doc. A. 15, 1928, V, p. 87).

Eire. In the *Ramava*, a vessel apparently in the possession of the U.S.S.R., the High Court of Eire, after reviewing at length English and American cases, came to the conclusion, in 1941, that 'there was now no rule or usage of public international law granting immunity from process to State-owned trading vessels'.¹ Reference may also be made to the decision given in 1944 by the Supreme Court of Eire in *Saorstat and Continental Steamship Co. v. Rafael de las Morenas*, where the Court upheld its jurisdiction in an action brought against the defendant, a Colonel in the Spanish army, who came to Eire as head of a commission appointed by the Spanish Government to purchase horses for the use of the Spanish army. The Court said:

'The claim made on behalf of the plaintiff company is that the defendant, while in this country, entered into a contract with them, that he failed to carry out the terms of the contract, and that they, thereby, suffered loss and damage, and they sue him for damages for breach of the contract. They claim that the appellant is personally responsible to them, and they do not seek redress against any other person or persons. In these circumstances, and having regard to the nature and scope of the action, I am of opinion that there is no ground for the suggestion that the Government of Spain is being impleaded, either directly or indirectly, and no basis for the claim that the proceedings should be set aside.'²

Russia. From the scant evidence available—a single decision given by the Russian State Council³ in 1893—it appears that the courts of pre-revolutionary Russia assumed jurisdiction in actions arising out of activities *jure gestionis*. In the case in question, arising out of negotiations between the plaintiff and the representative of the Italian Ministry of War concerning the laying out of a cemetery for the Italian dead in the Crimea, the Council declined jurisdiction on the ground that the Italian Government had acted *jure imperii*. No evidence as to the practice of Soviet Russia seems available except with regard to seizure of the property of foreign governments. A decree of 14 June 1929 provided that no seizure is permissible unless with the authorization of the Council of People's Commissars. This applies only to states which grant reciprocal treatment to Soviet Russia.

Poland. The rare decisions of Polish courts before the Second World War show that they inclined to exercise jurisdiction in matters *jure gestionis*. In a decision given in 1926, in an action against the Czechoslovak Republic arising out of an injury inflicted by a car owned by Czechoslovakia, the Supreme Court declined jurisdiction on the ground that the action was directed against Czechoslovakia as a sovereign state.⁴ However, in the case of the *Russian Trade Delegation v. Fajana*⁵ the Supreme Court in assuming jurisdiction attached importance not only to the fact that by bringing proceedings the Soviet Union recognized the jurisdiction of Polish courts. The Court intimated that such submission may have taken place 'by the very fact of taking up commercial activities in Poland'. It appears from an observation made by the Polish representative at the meeting of the Committee of Experts for the Progressive Codification of International Law in 1927⁶ that Polish courts assumed jurisdiction in an

¹ *The Irish Law Times*, 75 (1941), p. 153; *Annual Digest*, 1941-2, Case No. 20.

² 1945 I.R. 291; *Annual Digest*, 1943-5, Case No. 25.

³ A semi-judicial body. For an account of the case see Allen, *The Position of Foreign States before National Courts* (1933), p. 293.

⁴ *Anna D. v. Treasury of Czechoslovak Republic* (Supreme Court, 1926), *Orzecznictwo Sądów Polskich* [Decisions of Polish Courts], 5, p. 440; *Zeitschrift für Ostrecht*, 1 (1927), p. 275; *Annual Digest*, 1925-6, Case No. 180.

⁵ *Ibid.*, 1927-8, Case No. 108.

⁶ 3rd Session, p. 53.

action against the United States Shipping Board. Similarly, in a case decided in 1937, in an action brought against the German state on account of illegal exaction of taxes, the Supreme Court, in declining jurisdiction, relied mainly on the fact that the action was not one *jure gestionis*. It also attached importance to the circumstance that as Germany in similar cases granted immunity the Polish courts were bound to do so by virtue of Article 5 of the Polish Code of Civil Procedure which accepted the principle of reciprocity.¹

France. France and Holland are occasionally referred to as countries in which courts grant jurisdictional immunity to foreign states irrespective of whether the activities in question are *jure imperii* or *jure gestionis*. That estimate is of doubtful accuracy. While for a prolonged period before the First World War French courts granted absolute immunity, there has been since then a tendency in the opposite direction. That tendency may be discerned even in those decisions in which the courts declined jurisdiction. Thus when in 1921 the Court of Appeal of Paris set aside a judgment for the respondent who sued the Swiss Government on a contract of shipment of goods to Switzerland in connexion with the import of goods to that country during the First World War, it did so on the ground that the transactions in question were not of a purely commercial character.² On the other hand, basing itself squarely on the distinction between acts *jure imperii* and acts *jure gestionis* and affirming the identity of the position of the foreign state and of the French state acting in similar circumstances, the Court declined to grant immunity to the Roumanian Government in connexion with a contract made by the latter for the sale of goods to be resold to Roumanian nationals. The Court said:

‘... si la règle du droit des gens qui proclame l’indépendance des nations, découle du principe de leur souveraineté, elle est sans application, quand la souveraineté n’est pas mise en cause, lorsqu’il s’agit d’actes n’ayant pas le caractère d’actes de la puissance publique et qu’ainsi les États étrangers sont, en tant que personnes civiles et au même titre que les autres étrangers, justiciables des tribunaux français dans les conditions prévues par le Code civil, leur indépendance n’étant pas en jeu lorsqu’ils sont appelés en justice non pas comme pouvoir, mais uniquement par l’exercice ou la défense d’un droit privé...’³

The disinclination to grant immunity in matters *jure gestionis* found clear expression in cases relating to the commercial transactions of the Soviet Union in France. In 1926, in *Société de Gostorg et Union des Républiques Socialistes Soviétiques v. Association France Export*, the Court of Paris held that the Soviet Commercial Delegation in France was subject to the jurisdiction of French courts, including the attachment of its property. It said: ‘Transactions of a commercial character extending to all fields are only to be regarded as ordinary commercial transactions having nothing in common with the principle of sovereignty of States.’⁴ In 1937, in the case of *De Fallois v. Piatakoff*,⁵ the Court of Cassation observed that, in the absence of special treaty provisions, the Soviet Commercial Agency ‘even if in Soviet internal law it might be an integral portion of the diplomatic representation, had not as regards our institutions the like character—the manifestations of its character being merely commercial acts not affecting the

¹ *Annual Digest*, 1935-7, Case No. 95, p. 240.

² *Lakhowsky v. Gouvernement fédéral suisse et Regnier* (Cour d’appel, Paris, 1921), *Journal du droit international*, 48 (1921), pp. 179, 180.

³ *État Roumain v. Pascalet et Cie* (1924), *Dalloz hebdomadaire*, 1924, p. 260.

⁴ *Annual Digest*, 1925-6, Case No. 125.

⁵ *Ibid.*, 1935-7, Case No. 84.

principle of sovereignty of States'. In 1931 the Seine Civil Tribunal granted an application for the provisional attachment of the funds of the commercial representation of the Union of Socialist Soviet Republics in respect of debts of a Russian firm. It said: 'Attendu que la représentation commerciale de l'U.R.S.S. en France représente obligatoirement, aux termes de la législation soviétique, les sujets et les sociétés russes qui font du commerce à l'étranger; attendu, en outre, que l'État russe est pris en tant qu'État commerçant et non pas comme État souverain.'¹ Similarly, French courts assumed jurisdiction, coupled with execution, in *Union of Soviet Socialist Republics v. Association France Export*,² decided in 1929 by the Court of Cassation which allowed execution against the Soviet Trade Delegation. A recognized authority on the subject considers that these cases of allowance of execution constitute significant precedents.³

In *Chaliapine v. Union of Socialist Soviet Republics*, in an action for damages for a breach of copyright by selling in Paris an abridged and mutilated edition of an autobiography of the plaintiff, the Court of Cassation rejected, in 1936, the plea that the control exercised by the Soviet Government over the export of books made it an act of sovereignty as distinguished from a commercial transaction. It held that the facts alleged against the Commercial Agency did not relate to acts of sovereignty of the Russian state, but arose from commercial transactions. The Commercial Agency, which was responsible for those transactions, was not immune from the jurisdiction of the French courts. The Court said: 'This is not a question within the domain of political affairs, but of operations of a strictly commercial character which the courts can consider without any interference with Russian State administration. The publication of the memoirs of a singer is in no way a political act. . . .'⁴

In 1937 the Court of Appeal of Bordeaux assumed jurisdiction in an action against the Roumanian state as the universal legatee of a Roumanian subject who died in France. The Court said:

'This immunity from jurisdiction is absolute when applied to acts of an administrative or political order, seeing that the judge who decided these matters would be led to interfere with the exercise of a foreign sovereignty. It is otherwise when the dispute relates to civil interests properly so-called, when it affects the sphere of private relations. Thus a State which is the universal legatee of one of its nationals, relying on the universal succession which has fallen to it, acts in continuation of the personality of the testator. . . . At the same time it is bound by the obligations attaching to it; it is bound to respect particular legacies.'⁵

In *Étienne v. Government of the Netherlands* the Tribunal Commercial de la Rochelle in 1947 declined jurisdiction in an action against a vessel requisitioned and operated by the Dutch Government in connexion with activities which the Court considered to be *jure imperii*. It said:

'The Ambassador of the Netherlands in Paris contends, in a written declaration, that the steamer 'Ittersum', requisitioned and operated by his Government, was employed on a political, not a commercial venture. His testimony is confirmed by a declaration of the Ministry of Transport of the Netherlands. French Courts have always held that ships employed by a foreign State for a political object are not subject to the common law or to the jurisdiction of French courts. This attitude has recently been endorsed by

¹ *Magasins Universels de la R.S.F.S.R. v. Kahn*, *Journal du droit international*, 58 (1931), p. 412.

² *Annual Digest*, 1929-30, Case No. 9.

³ Niboyet in *Revue générale de droit international public*, 43 (1936), pp. 541-3.

⁴ *Dalloz périodique*, 1937, Part i, p. 63; *Sirey*, 1937, Part i, p. 104; *Annual Digest*, 1935-7, Case No. 85.

⁵ *État Roumain v. Dlle Aricastre*, *Revue critique de droit international*, 33 (1938), p. 297; translation from *Annual Digest*, 1935-7, Case No. 91. But see below, p. 262, n. 4.

the Brussels Convention of April 10, 1926. The 'Ittersum' proceeded to Sorel (Canada) in order to load wheat for the revictualling of the Netherlands. That operation had no commercial or speculative character.'¹

When in 1919 the Court of Appeal of Rennes reversed a judgment of the Court below in the case of the *Angers* and the *Hungerford*, two vessels owned by the British Government and operated by a firm in Belfast, it did so on the ground that the vessels in question were not engaged in a private venture, but were acting in the national interest.²

In the *Vestwig* case, decided in 1946, the Court of Cassation held that there was no immunity when the foreign state acted as trustee of private property. In that case the plaintiffs brought garnishee proceedings in respect of moneys due to them and figuring in the account of the Norwegian state. The lower courts denied that the funds were immune, on the ground that the Norwegian Government was merely acting as a trustee on behalf of its national, and was therefore not impleaded. On the order of the Minister of Justice the *Procureur Général* at the Court of Cassation lodged an appeal against these decisions. He contended that if the immunity of foreign states were regarded as absolute, the courts had no power to inquire into the nature of the control of the Norwegian state over the funds in question. If, on the other hand, a distinction were drawn between acts of sovereignty and acts which did not have a political character, the Court of Cassation would uphold the decisions of the lower courts. The Court of Cassation held that the appeal must be dismissed. The immunity of foreign states before French courts was based on their sovereignty. The sovereignty of the Norwegian state was not involved in the present case.³ On the other hand, in *État Roumain v. Dlle Aricastre*, a case decided in 1950, the Court of Appeal of Poitier, departing from a decision given in the same case by another French Court of Appeals, declined jurisdiction in an inheritance action⁴ over the State of Roumania acting as a legatee.

The cases in which the French courts declined jurisdiction have been mostly concerned with public loans issued by foreign states—such as the case of the Portuguese loan of 1832 the legality of which had apparently never been recognized by the Portuguese Government.⁵ When in 1929 the Court of Appeal of Aix admitted, in a case concerning interest on bonds issued in 1904 by the Moroccan Government, the plea of immunity put forward by that Government, it did so on the ground that such loans were within the category of acts *jure imperii* and not *jure gestionis*.⁶ In 1936 the Tribunal Civil de la Seine declared itself incompetent in an action against the Spanish National Tourist Office on the ground that it was 'a State organisation without any commercial character'.⁷ In the same year the Court of Appeal of Paris, in an action against the American Battle Monuments Commission, declared that French courts had no jurisdiction.⁸

It appears from the above survey that France can no longer be included among countries which recognize an absolute immunity of foreign states from jurisdiction.⁹

¹ Translation from *Annual Digest*, 1947, Case No. 30; *Dalloz*, 1948, p. 84.

² *Revue de droit international privé*, 18 (1922-3), p. 743.

³ *Procureur Général v. Vestwig*, *Sirey*, 1947, Part i, p. 137; *Annual Digest*, 1946, Case No. 32.

⁴ *Sirey*, 1950, Part i, 2, p. 141. In a Note to that case Professor Niboyet expressed doubts as to the authority of this case as a precedent. And see above, p. 261, n. 5.

⁵ *Reilhac v. Comptoir National d'Escompte*, decided in 1895 by the Seine Civil Tribunal: as reported in Comment to Article 11 of the *Harvard Draft* (p. 636).

⁶ *Gouvernement du Maroc et Maspéro v. Laurans et autre*, *Gaz. Pal.*, 1930, 1, p. 246; *La Semaine juridique*, 1930, pp. 602, 605-6.

⁷ *Annual Digest*, 1935-7, Case No. 87.

⁸ *Ibid.*, Case No. 88.

⁹ See Sibert, *Traité de droit international public* (1951), vol. i, p. 271. See, however, Hamson in this *Year Book*, 27 (1950), pp. 292-331, for a somewhat different estimate of the French practice. Nevertheless, while denying that French courts have assumed jurisdiction over the foreign states

Holland. Dutch practice on the subject has been hesitating and marked by an occasional discrepancy of views of the judiciary and the executive. In a series of cases before and during the First World War Dutch courts not only assumed jurisdiction over foreign states; they also proceeded to attachment and execution. In 1900 they gave judgment in an action against the Belgian state in connexion with an increase in railway fares on the part of a company operating under a concession from the Belgian state.¹ In 1904 the courts attempted to levy execution upon a Belgian state vessel used for training purposes.² In 1909 a court at Haarlem apparently authorized the seizure of a Swedish submarine in respect of a claim for assistance rendered to her.³ Above all, in the well-known *De Booi* case, which occupied Dutch courts and the Dutch Foreign Office for a long period, they asserted jurisdiction, to the point of execution, with respect to what was in effect an act of the German forces in Belgium closely connected with military operations.⁴ The Executive successfully interposed in these cases by causing the enactment of special decrees. That new legislation was subsequently applied in a number of cases—including, in 1923, an action in tort against the Belgian state following upon a collision between the vessel owned by the plaintiff and a tug-boat owned by Belgium.⁵

Previously, in the case of *South Africa v. Herman Grote*, decided in 1921, the District Court of Amsterdam interpreted the relevant Dutch legislative provisions of 1829 and 1917 to the effect that, while limiting the jurisdiction of Dutch courts with respect to acts performed by foreign states *jure imperii*, they left open the question of their jurisdiction in other matters. The Court upheld the attachment of certain property of South Africa in respect of a claim for maritime assistance. It said:

'Article 12 (a) gives no specific list of the exceptions recognised by the Law of Nations, to which it refers. It may safely be said that with regard to *acta imperii*, either lawful or unlawful, whether acts of war or not, a State is not subject to the jurisdiction of the judiciary of another State. The intention of the new provision was clearly to sanction this principle. However, in enacting the new law, the Legislature had not given any explicit decision with regard to cases in which foreign States are acting, not in their capacity of sovereign Powers, but as ordinary persons. In cases where the judicial acts at issue have no connection whatever with the exercise of sovereign rights, the question ought to be decided in the sense that the foreign State is subject to the jurisdiction of Dutch courts.'⁶

The principle of the absolute immunity of foreign states, regardless of the distinction between acts *jure gestionis* and acts *jure imperii*, was affirmed emphatically in 1942 by the Amsterdam Court of Appeal in the case of *Weber v. Union of Soviet Socialist Republics*—an action against the Union of Soviet Socialist Republics in respect of a contract concluded by one of its agencies.⁷ In a Note on this judgment contributed to

as such, the learned writer admits that they have done so with regard to organized entities which are engaged in commercial or similar activities and which, according to French courts, are distinguishable from the foreign state as such. As in most matters of this nature states act through separate agencies created by them, the distinction, even if acceptable, seems to be devoid of practical importance.

¹ *De Belgische Staat v. Société du Chemin de Fer Internationale* in *Weekblad van het Recht* (1902), 7812.

² *Ibid.* (1904), 8010.

³ *Ibid.* (1909), 8921.

⁴ An account of this and the preceding cases will be found in Allen, *The Position of Foreign States before National Courts* (1933), pp. 103-8.

⁵ *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (*Arrond. Rechtbank*, Dordrecht, 1923), *Weekblad van het Recht* (1923), No. 11088, 5: 2.

⁶ *Nederlandsche Jurisprudentie*, 1921, p. 849; *Annual Digest*, 1919-22, Case No. 8.

⁷ *Ibid.*, 1919-42, Supplementary Volume, Case No. 74.

the *Annual Digest and Reports of Public International Law Cases* where the case is reported in the Supplementary Volume, 1919-42, the contributor, Professor Verzijl, says: 'It is of interest to observe that this judgment in favour of jurisdictional immunity of the Soviet Government was given by a Dutch court at the time of the occupation of Holland by German forces.' It is also of interest to note that in a subsequent judgment given by the same Court in the same year the relevance of the distinction between the two kinds of state activities was fully admitted. The case in question—*Poortensdijk Ltd. v. Soviet Republic of Latvia*—arose out of an action against a bank subsequently nationalized by the Soviet Latvian authorities. The Court held that that action had been performed *jure imperii*.¹ Previously, in *The Garbi*, a vessel requisitioned in 1937 by the Republican Spanish Government, the District Court of Middelburg admitted the existence of the distinction in question though it held it to be irrelevant for the purpose of the case before it.² In an earlier case, decided in 1932, the District Court of Amsterdam declined jurisdiction in an action against the Union of Soviet Socialist Republics for the payment of the principal and interest of a debenture of the Russian consolidated public loan of 1880. The Court said: 'Although there is no unanimity on the question whether, in principle, a sovereign State may be subjected against its will to the jurisdiction of a tribunal of another State for *acta gestionis*, it is nevertheless almost universally taken for granted, though on different grounds, that no such subjection is possible in the case of a claim in regard to State loans raised by public subscription.'³ The most recent decision, available to the writer, of a Dutch court fully affirms the distinction, for the purpose of immunity from jurisdiction, between acts *jure imperii* and acts *jure gestionis*. In the case of *Nederlandse Rijnbank, Amsterdam v. Mühlig Union*, decided in 1947 by the Council for the Restoration of Legal Rights (Division for Judicial Settlement), the Court held that it had jurisdiction notwithstanding the fact that the defendant company had been nationalized and merged into a public corporation under Czech law. The Court held that 'the principles of international law concerning the immunity of States from jurisdiction do not apply to State conducted undertakings in the commercial, industrial, or financial fields'.⁴

It would appear, accordingly, that the balance of authority, so far as the judicial practice of Holland is concerned, is probably in favour of the recognition of the distinction between acts *jure imperii* and acts *jure gestionis* and of the denial of absolute immunity of foreign states.

Scandinavian countries. While no direct information is available as to the position in Denmark or Norway, reference may be made to the two leading textbooks in those countries. Professor Ross, in his *Text-book of International Law* (English translation, 1947), says that 'it must probably now be admitted that a change has taken place in the international view, the duty [of granting immunity] now only applying to the former cases [acts *jure imperii*]'.⁵ Professor Castberg's view with regard to Norway is to the same effect.⁶ In Sweden, the leading case of *The Rigmor*, decided in 1942 by the Supreme

¹ *Annual Digest*, 1919-42, Supplementary Volume, Case No. 75.

² *Ibid.*, Case No. 83.

³ *De Froe v. The Russian State*, *Annual Digest*, 1931-2, Case No. 87. In a Note to this case, contributed in 1938, Professor Verzijl stated that 'the question whether or not foreign States may be sued in Dutch Courts in respect of *acta gestionis* has not yet been definitely settled' (*ibid.*, p. 17).

⁴ *Annual Digest*, 1947, Case No. 27.

⁵ p. 190.

⁶ *Folkerett*, pp. 70, 100. As to the tendency, in Scandinavian countries, to put restraints on state immunity, in particular in matters of commerce, see *Comité Maritime International, Bulletin*, No. 57, pp. 122 ff., 194.

Court, although apparently based on the principle of absolute immunity is, in effect, inconclusive.¹ The judgment discusses in detail the limits of exemption from jurisdiction. The following passage may be noted:

'The modifications in the principle of immunity which in recent times have won recognition in different degrees in different parts of the world have been concerned solely with cases where the conflict in which the foreign State was involved has arisen out of facts which normally relate to the intercourse of private legal subjects with one another and are then covered by private law. On the other hand, the principle holds good unconditionally if the dispute relates to a situation which derives its character from an act of sovereignty on the part of the foreign State, as, for example, in the case of legal action for the vindication of a claim where the foreign State can justify its possession of the object of the claim on purely public law grounds, so long as these grounds can by their nature be recognized as legally valid within the territory of the country where the proceedings take place.'²

On the whole it seems doubtful whether Sweden can be regarded as adhering to the principle of absolute immunity. In its reply to the questionnaire sent out by the League of Nations Committee for the Progressive Codification of International Law, the Swedish Government drew attention to the tendency of Swedish courts to limit the jurisdictional immunities of foreign states in matters arising out of financial transactions. It pointed out that that was a natural attitude for Swedish courts to adopt seeing that in this respect the Swedish state was, so far as Swedish law was concerned, on a footing of complete equality with private individuals and that it could not refuse to appear before Swedish courts in connexion with acts 'which concern the administration of business and are not acts of sovereignty'.³ In general, the Swedish Government observed that the rules adopted in many countries and recognizing an extensive immunity of foreign states 'are becoming more and more unsatisfactory as States extend their activities in the industrial and commercial sphere and in that of transportation'.⁴

Latin-American countries. There is but scant evidence of practice from these countries, but such evidence as there exists tends in the direction of including these countries

¹ The judgment—fully reported in the *Annual Digest*, 1941-2, Case No. 63—refers to the principle of absolute immunity as representing, prior to the passing of the Law of 17 June 1928, the time-honoured view of Swedish law.

² As reported in *American Journal of International Law*, 37 (1943), p. 141. It is also of interest to note, in this case, the attitude of the Swedish Supreme Court in relation to the question of immunity with regard to possession illegally obtained. The Court said: 'It does not follow from the above that under Swedish law executive interference with a foreign Power's factual possession of any moveable property is in all circumstances inadmissible, even where the possession can be justified by purely public law grounds. If, for example, possession has been acquired under compulsion, or in a manner involving arbitrary interference with previous possession within Swedish territory, there is no doubt but that the injured party ought to receive legal assistance from the Swedish executive authorities to restore him to possession' (*Annual Digest*, 1941-2, Case No. 63). Similarly, in *The Solgry*, decided in the same year, the following observation of the Court is relevant: 'The possession of the vessel, however, has been transferred on Swedish territory to that government and the transfer has taken place without violence or any other arbitrary disturbance of the earlier possession' (*ibid.*, 1919-42, Case No. 82). However, in the absence of clear evidence of illegality in obtaining possession, immunity will be granted even if possession is not accompanied by ownership recognized by Swedish law (see *Russian Trade Delegation v. Carlbon* where the Supreme Court affirmed, in 1944, the immunity of a ship in possession of Soviet Russia although it came to the conclusion, in a judgment given on the same day, that as the nationalization decree in question had no extra-territorial effect no property had been acquired over the ship: *ibid.*, 1943-5, Cases Nos. 15 and 31).

³ Doc. A. 15, 1928, V, p. 84.

⁴ At p. 83.

among that great majority of states which recognize affirmatively the distinction between acts *jure imperii* and acts *jure gestionis*. Thus Article 34 of the Argentine Civil Code gives Argentinian courts jurisdiction in actions against foreign states arising out of matters *jure gestionis*. From a decision given in 1937 by the Argentinian Federal Court of Appeal in *The Ibai* it appears that one of the reasons why the Court held that it had no jurisdiction in respect of a ship requisitioned by the Spanish Government was that the ship's voyage 'had nothing to do with speculation or gain, but was wholly prompted by the necessity of providing efficiently for the defence of the State'.¹ In 1924, in *The Cokato*, the Federal Court of Appeal of the Capital affirmed the jurisdiction of Argentinian courts over the United States Shipping Board Emergency Fleet Corporation.² Reference may also be made to the case of *Gobierno de Italia en Suc. v. Consejo Nacional de Educación*, decided in 1940 by the Camara Civil de la Capital, in which the Italian state was held, in its capacity as legatee, liable to taxation and other relevant provisions of the Argentinian law. The Court said: 'The fiscal law is to be applied to all entities which are persons, including the Italian State in its character as a juridical person.'³ Accioly, the author of the leading Brazilian treatise on international law, gives no reference to the practice of his own or other Latin-American countries.⁴ However, he expresses himself in favour of jurisdiction of municipal courts in cases in which such jurisdiction derives from the voluntary renunciation of immunity. Such renunciation must, he says, be implied, *inter alia*, 'quand il [the foreign State] fait des actes de commerce ou d'industrie en territoire étranger'. In the most recent Brazilian textbook on the subject Professor Podestà Costa gives reasons for limiting jurisdictional immunity with regard to transactions *jure gestionis*. He says: 'Y en cuanto a los contratos que el Estado realiza *jure gestionis* en el exterior, debe reconocerse que él tiene personalidad civil, aunque su ejercicio está subordinado a la jurisdicción local.'⁵ The provisions of the so-called Bustamante Code of 1928, which has been accepted by a number of Latin-American states, are somewhat ambiguous.⁶

Germany. Although in 1921⁷ the German Reichsgericht affirmed, not without some hesitation, the principle of absolute immunity, it is difficult to express an unqualified view as to the attitude of German courts in the matter. Prior to 1921 German courts assumed jurisdiction in a number of cases on the ground that the foreign state had acted *jure gestionis*. This was the view adopted in 1885 by the Bavarian Court of Conflicts of Jurisdiction in an action against the Austrian Government as the owner of a railway. The Court said in that case:

"The question must be considered whether the principle referred to would be applicable without exception also when the issue pertains to private law relationships. Such a critical

¹ *Annual Digest*, 1938-40, Case No. 96.

² *Ibid.*, 1923-4, Case No. 71.

³ *Ibid.*, 1941-2, Case No. 52.

⁴ *Traité de droit international public*, French translation by Goulé, vol. i (1940), pp. 214, 215.

⁵ *Manual de derecho internacional público* (1947), p. 65.

⁶ Article 333 provides that 'the judges and courts of each contracting State shall be incompetent to take cognizance of civil and commercial cases to which the other contracting States or their heads are contracting parties, if the action is a personal one, except in case of express submission or of counterclaims'. On the other hand Article 335 lays down that 'if the foreign contracting State or its head acted as an individual or private person, the judges or courts shall be competent to take cognizance of the cases where real or mixed actions are brought, if such competence belongs to them in respect to foreign individuals in conformity with this Code'. There appears to be some doubt as to the correct version of this article. See Hudson, *International Legislation*, 1928-1929, vol. iv (1931), p. 2328.

⁷ See below, p. 267.

distinction between the applicability of this premise in the domain of public law on the one hand, and private law on the other, seems the more justified since it was a generally recognized principle in Roman law, and one which has been consistently adhered to in modern legislation and, especially, in the Austrian civil law and public law, that the State assumes as soon as it enters the domain of private law, the position to which a private-law subject is entitled, with respect to its rights and obligations and with respect to judicial proceedings serving the protection of such rights.¹

In 1920, in the case of the *Turkish Purchases Commission*, the Prussian Tribunal for Conflicts of Jurisdiction held that although, as a rule, submission to jurisdiction on the part of a foreign state did not imply submission to execution, the position was different when, as in the case before the Court, submission to execution could be implied by conduct such as consisted in the opening, in Germany, of a special banking account for the satisfaction of the claims of the firm which had supplied Turkey with military material.²

On the other hand, in *The Ice King*, the Reichsgericht, in a detailed judgment given in 1921, assumed jurisdiction in an action for damages sustained in a collision with a vessel operated by the United States Shipping Board. It did so not without having considered the alternative solution. The Court said:

‘ . . . It cannot be denied that the efforts made particularly in writings on international law to remove or, at least, to restrict the international law principle of immunity regarding State property used for private purposes, especially in the field of international maritime law, have found more and more sympathy in competent circles. However, this development has not yet penetrated so generally in the practice of international intercourse that one can therefrom conclude a legally warranted change of the principle of international law. . . .’³

The decision in *The Ice King* followed a series of decisions given by German courts in the first two decades of the twentieth century which affirmed the doctrine of absolute immunity—a development which was perhaps not unconnected with the emphasis on the sovereignty of the state, both domestic and foreign, in German legal and political thought of that period. Already in 1905 the Supreme Court held that German courts had no jurisdiction in an action against the Belgian Railway Administration. This was so, the Court said, although Belgian courts had adopted a different attitude.⁴ In the well-known *Hellfeld* case, decided in 1910, the Prussian Court for Conflicts of Jurisdiction found that, regardless of the question whether German courts had jurisdiction on the merits, they had no power to order the attachment of the property of a foreign state.⁵ In 1915 German courts declined jurisdiction in an action against the Russian Government in respect of work performed for it in connexion with a fair exhibition at Leipzig. This was so although the decision was given at a time when a state of war existed between the two countries.⁶

The developments subsequent to the case of *The Ice King* do not bear out the view that German courts are committed to the principle of absolute immunity. Thus in an action decided in 1925 against the Finnish State Railway Administration the Court,

¹ *Heizer v. Kaiser-Franz-Joseph-Bahn A.-G.*, as reported in *Harvard Research Draft*, Comment to Article 7, p. 534.

² *Annual Digest*, 1919-22, Case No. 77.

³ *Gustaf Selling v. United States Shipping Board (The Ice King)*, *Entscheidungen des Reichsgerichts in Zivilsachen*, 103, pp. 275, 276, 277; *Annual Digest*, 1919-22, Case No. 102.

⁴ *Entscheidungen des Reichsgerichts*, 62 (1906), p. 165.

⁵ *American Journal of International Law*, 5 (1911), p. 490.

⁶ *Rechtssprechung des Oberlandesgerichts*, 31 (1915), p. 175.

while granting immunity, attached importance to the fact that the place of performance of the contract was in Finland.¹ In the *Halig* case jurisdiction was declined, in an action aiming at the removal of the insignia of the Polish state from a building occupied by the Polish Vice-Consul. The decision was given on the ground that the case involved activities *jure imperii* on the part of a foreign state. The Court said:

'The placing of a coat of arms of a foreign State is an act of sovereignty and a foreign State can never be subject to local jurisdiction in respect of such an act. The independence and equality of sovereign States, recognized in international practice, does not permit their subjection to the jurisdiction of another State in respect of sovereign acts.'²

The United States of America. It is doubtful to what extent the law of the United States continues to adhere rigidly to the doctrine of absolute immunity of foreign states. While the Executive has expressly abandoned it, courts have continued to apply it—subject, however, to significant indications of a change. As in the United States the attitude of the Executive in the matter of jurisdictional immunities is of considerable weight, as compared with other countries,³ it is useful to draw attention to this aspect of the legal position. As early as 1918 the Secretary of State addressed a communication to the Attorney-General of the United States stating that 'where [government-owned] vessels were engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade, if they were to enjoy its benefits and profits'.⁴ He explained the statement by reference: (1) to the soundness of the view that 'when a Sovereign enters into business, he submits himself to the conditions thereof'; and (2) to the consideration that 'if the claim of immunity were granted, American citizens as well as foreigners would be left without recourse in the Courts of such just claims as they might have against the vessels concerned' and 'their only means for obtaining satisfaction would be through political channels—either through Congress, or through diplomacy'. In 1921, in reply to a request of the Italian Ambassador that steps be taken to prevent the arrest of the *Pesaro*, an armed merchant vessel of the Italian Government, the Department of State said: 'The Department is of the opinion that vessels owned by a state and engaged in commerce are not entitled, within the territorial waters of another state, to the immunity accorded vessels of war, and that notwithstanding such ownership these vessels are subject to the local jurisdiction to the same extent as other merchant vessels.'⁵ Instructions to similar effect were issued to American diplomatic and consular officers abroad.⁶

The attitude of the State Department as outlined above is not confined to state-owned ships engaged in commerce. Thus when an action was brought by the United States in 1927 against the *Deutsche Kalisyndikat-Gesellschaft* in connexion with the enforcement of anti-trust laws, the French Ambassador informed the Department of State that the defendant corporation was an organization 'created and controlled by the French Republic' and that an action instituted against the corporation was, in fact, directed against the French state. In reply to an inquiry from the Attorney-General of the United States as to the views of the Department of State regarding the matter, the latter stated that 'it has long been the view of the Department of State that agencies

¹ *Gehrckens v. Järnvägstyrelsen* (Oberlandesgericht, Hamburg, 1925), *Rechtssprechung des Oberlandesgerichts*, 45, p. 94; *Hanseatische Rechts-Zeitschrift*, 8 (1925), p. 904.

² *Halig v. Polnischen Staat*, *Zeitschrift für Völkerrecht*, 15 (1929), pp. 271, 275-6; *Annual Digest*, 1927-8, Case No. 104.

³ See Lyons in this *Year Book*, 24 (1947), pp. 116-47.

⁴ See Hackworth, *Digest of International Law*, vol. ii (1941), p. 429.

⁵ *Ibid.*, p. 437.

⁶ *Ibid.*, pp. 439-40.

of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions'.¹ However, in the absence of an express legislative change, the courts did not consider themselves at liberty to depart from established judicial precedent wedded to the principle of absolute immunity. Thus when in 1925 in connexion with the proceedings against *The Pesaro*, an Italian government-owned ship engaged in commerce, the Department of State declined to issue a certificate that the vessel was immune from process,² the Supreme Court, in the absence of a clear direction from the Executive, proceeded to determine the issue. It did so by adopting, by a majority, the traditional view on the subject. It said: 'When, for the purpose of advancing the trade of its people or providing revenue for its treasury, a Government acquires, mans and operates ships in the carrying trade, they are public ships, in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance or training of a naval force.'³ This view was reaffirmed by the Supreme Court in 1938 in the case of *The Navemar*⁴ and in other cases.

However, while it is probable that courts of subordinate jurisdiction in the United States would still deem themselves bound by the traditional doctrine of absolute immunity as reaffirmed by the Supreme Court, it is not certain what—in view of general developments in this sphere—may be the attitude of that high tribunal in the future. It is possible that instead of choosing the drastic method of a formal reversal of the established doctrine, it may proceed by way of a less direct approach as it did twenty years later in *Republic of Mexico v. Hoffman*.⁵ The vessel in question was owned by the Mexican Government and engaged in transportation of cargoes. The State Department declined to issue a certificate that she was entitled to immunity. The Court held that the vessel was not immune from jurisdiction. It did so on the ground that although owned by the Mexican Government the vessel was not actually in its possession. In an illuminating Concurring Opinion Mr. Justice Frankfurter pointed to the tenuous nature of the notion of possession for the purpose of distinction between vessels which are entitled to immunity and those which are not. He indicated the possibility of regarding the decision of the Court as 'an implied recession' from the decision in *Berizzi Brothers v. Steamship Pesaro*—which he subjected to strong criticism—and he urged that its implications 'in the light of the important developments in the international scene that twenty years have brought call for its reconsideration'. The probability of such reconsideration was clearly foreshadowed in the concluding passage of the Opinion of the Court as delivered by Chief Justice Stone. He pointed to 'the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize'. In view of the consistent policy of

¹ Hackworth, op. cit., p. 481.

² When the case of *The Pesaro* first came before American courts, the State Department, in answer to an inquiry by Judge Mack, replied as follows: 'It is the view of the Department that government owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character' (*The Pesaro*, 277 Fed. 473, 479-80, note 3).

³ 271 U.S. 562; *Annual Digest*, 1925-6, Case No. 135.

⁴ 303 U.S. 68, 74.

⁵ (1945), 324 U.S. 31; *Annual Digest*, 1943-5, Case No. 39.

the Government of the United States in the matter of the activities of foreign states in the sphere of private law, the passage quoted may properly be considered as not irrelevant to the future attitude of the Supreme Court or, as shown in the case of *The Beaton Park*, perhaps even of other courts. *The Beaton Park* was decided by the United States District Court for the Western District of Washington, Northern Division, one year after the decision in *Mexico v. Hoffmann*. This was an action against the Steamship *Beaton Park* for damages for personal injuries. The Canadian Government, owners of the vessel, entered a plea to the jurisdiction. It was held that the plea must be rejected and that a merchant vessel owned, but not possessed or operated, by a foreign government was not entitled to immunity from jurisdiction. The Court said:

'Here it was not a government function that was being pursued. It was merely an ordinary commercial operation of a merchant ship owned but not possessed or operated by the foreign government, whereas in *Ervin v. Quintanilla*, 5 Cir., 99 F. 2d 935, and in *The Pesaro*, 271 U.S. 562, the vessel was both owned and possessed by the foreign government. In the absence of statute or treaty, no sound principle of law or of international comity requires that the courts of this country treat a foreign government more favorably as to sovereign immunity than our own Government is treated by the courts.'¹

In 1948 the Appellate Division of the New York Supreme Court, reversing the judgment of the court below, declared that it had jurisdiction over the National Bank of Haiti, which was 'largely an instrumentality of the Republic of Haiti', in respect of conversion of securities of the plaintiff in pursuance of certain confiscatory Haitian decrees. These securities had been deposited with the defendants at the time when they were organized under the laws of Haiti as a commercial bank. Subsequently all other stock was acquired by the Haitian Government. The Court rejected the view of the court below that as the defendants acted under governmental orders their conduct did not amount to conversion. These orders, in the view of the Court, were purely confiscatory and, as such, void by the law of New York. Such confiscation, the Court said, 'has sometimes been compared, in its legal effects, to action by thieves or marauders'.² While this is merely an instance of assumption of jurisdiction over a foreign governmental agency with respect to obligations contracted by it at a time prior to its acquiring the character of such agency, the case is not without significance for the subject under review.

The United Kingdom. In the United Kingdom, although the principle of absolute immunity has been applied with a consistency bordering on rigidity, without distinction between acts *jure gestionis* and acts *jure imperii*, amidst a consistent discouragement of any notion of implied waiver, and regardless of the manner in which the foreign state obtained possession of the property, that practice has not been followed without some hesitation. That hesitation showed itself at the very inception of the adoption of the principle of absolute immunity, namely, in *The Parlement Belge*. There the Judge of first instance³—Sir Robert Phillimore, an international lawyer of distinction—held that a state-owned vessel engaged in commercial ventures did not enjoy immunity. When in *The Porto Alexandre*⁴ the Court acted on the principle of absolute immunity it did so not without an emphatic expression of its disapproval of the conduct of the foreign government in question—a disapproval which vividly illustrates the implica-

¹ 65 F. Supp. 213.

² *Plesch v. Banque Nationale de la République d'Haiti*, 77 N.Y.S. (2d) 41, 43.

³ (1879), 4 P.D. 129, 148. See also above, p. 249, n. 1.

⁴ [1920] P. 30.

tions of the general issue of the problem of jurisdictional immunities in modern circumstances.

When, in *The Cristina*, the House of Lords once more acted upon the law enunciated in *The Parlement Belge*, the effect of the observations of the majority of its members is such that it cannot be predicated with any assurance what may be the future attitude, in similar circumstances, of the highest tribunal of the realm. The main *ratio decidendi* in Lord Atkin's judgment was that the case was one 'of actual possession for public purposes'.¹ He admitted that 'there has been some difference in the practice of nations as to possible limitations of this second principle [immunity from seizure of property owned or in the possession of a foreign State] as to whether it extends to property only used for commercial purposes of the sovereign or to personal private property'. Lord Thankerton, after citing the relevant passage in the judgment of Brett L.J., stated that the decision in *The Parlement Belge* had reference to ships used for public purposes only, that there was therefore no reason why the Court in *The Porto Alexandre* should have considered itself bound by *The Parlement Belge*, and that he [Lord Thankerton] held himself free to reconsider the decision in *The Porto Alexandre*. Lord Macmillan was of the same view. Lord Maugham, after expressing agreement with the original judgment of Sir Robert Phillimore in *The Parlement Belge*, intimated his strong disapproval of the decision in *The Porto Alexandre* and gave expression, on grounds of justice, equity, and convenience, to the most pungent judicial criticism yet given of the rule of absolute immunity. Lord Wright—who alone subscribed without qualifications to *The Porto Alexandre* as expressing the correct rule of law—added: 'This modern development of the immunity of public ships has not escaped severe and in my opinion justifiable criticism on practical grounds of policy, at least as applied in times of peace.' In the *Dollfus Mieg* case² Evershed M.R. expressed agreement with Lord Thankerton's views in *The Cristina*.³

While therefore some doubt must be deemed to exist as to the possible future attitude of the highest tribunal in the country in matters involving private law activities of the foreign state, English courts seem to adhere to the principle of immunity in other spheres. This was conspicuously so in *Krajina v. Tass Agency*—a case arising out of an alleged libel by an agency of a foreign state—although even in this case there were indications of the emergence of a different approach inasmuch as the Court of Appeal examined in some detail the question whether the Tass Agency was an entity identical with the Russian state.⁴ The same tendency manifested itself in the case of *Dollfus*

¹ [1938] A.C. 485, at p. 492.

² [1950] 1 Ch. 333.

³ The United Kingdom has not become a party to the Brussels Convention of 1926 on the Immunities of State-owned Ships Engaged in Commerce. It appears that that fact is attributable to certain constitutional reasons rather than objections of principle. In its reply to the questionnaire of the Committee for the Progressive Codification of International Law the British Government considered, in 1928, the question of the competence of the courts in regard to foreign states 'to be suitable for consideration by an international conference' (Doc. A, 1928, V, p. 63). That cautious statement may be properly interpreted as meaning that already at that time the attitude of the British Government was not wholly adverse to the abandonment of the rigid principle of absolute immunity. This was also the attitude of the British member of the Committee (Dr. Arnold D. McNair). He made the following proposal: 'That the Committee submit to the Council its opinion that, though difficult, it would be worth while making the attempt, by means of an international conference, to arrive at a general convention under which States would become subject to the jurisdiction of foreign States as regards their commercial or industrial enterprise and their *navires de commerce* (Doc. C.P.D. 1/3rd Session/P.V., 1927, p. 54). Attention may be drawn in this connexion to the resolution, on the same lines, of the Imperial Economic Conference with regard to taxation of foreign government-owned trading enterprises (*Records of Proceedings*, H.M. Stationery Office, 1923, p. 22).

⁴ [1949] All E.R. 774.

Mieg v. Bank of England.¹ There the Court of Appeal, while affirming in principle the rule of immunity, in the result decided against it by reference to what has been described as 'the niceties of the English law of bailment'.² The House of Lords reversed, in effect, the decision of the Court of Appeal. It declined to withhold immunity by reference to a somewhat technical construction of the doctrine of possession. But it is significant that while in previous decisions English courts attached importance to emphasizing the necessity of giving a wide interpretation to the doctrine of immunity, in the *Dollfus Mieg* case in three out of the four judgments delivered in the House of Lords reference was made to the desirability, in the words of Lord Porter, of 'narrowly watching' the doctrine of immunity of foreign states.³ In *Sultan of Johore v. Abubakar*,⁴ decided in 1952, Lord Simon, in delivering the Opinion of the Judicial Committee of the Privy Council, attached importance to dispelling the view that there exists 'any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances'. He pointed out that if there existed such a rule 'there could have been no justification for reserving the case of a sovereign's ship engaged in ordinary commerce—a reservation that was, in fact, made by the majority of the House of Lords in the *Cristina* case'. On the other hand, in *Kahan v. Federation of Pakistan*⁵ the Court of Appeal fully adhered, as it was bound to do, to the judgment of the House of Lords in *Duff Development Company v. Government of Kelantan*⁶ in requiring, in addition to initial renunciation of immunity, express submission to jurisdiction at every stage.

There are only a few instances of the judicial practice of the countries of the British Commonwealth of Nations on the subject. In general it may be considered to follow that of the United States and the United Kingdom.⁷

Conclusions

The preceding survey of judicial practice does not lend itself to a detailed summary by way of conclusions. Its object is to show the change which has occurred, in the practice of most countries, in the direction of the abandonment of the principle of absolute jurisdictional immunity of foreign states. What, in the past, has been considered to be an exception limited to a small number of countries, in particular to Italy and Belgium, assumes, with the increasingly precarious exceptions of the United States and the United Kingdom, the complexion of a general practice based on the distinction between acts *jure gestionis* and acts *jure imperii*. Both the limited degree of the usefulness of that distinction for the future development of this branch of international law and its significance as implying the elimination of the principle of immunity as a general rule of international law have been indicated in the article above.

¹ [1950] All E.R. 747.

² Johnson in this *Year Book*, 27 (1950), p. 461.

³ *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England*, [1952] 1 All E.R. 572, at p. 585.

⁴ [1952] 1 All E.R. 1268.

⁵ [1951] 2 K.B. 1003, 1016.

⁶ See above, p. 235.

⁷ As to Canada see, for example, *The Indochina*, *Annual Digest*, 1919-22, Case No. 106, and *White v. The Ship Frank Dale*, [1946] Ex C.R. 555; *Annual Digest*, 1946, Case No. 34. Both decisions adopt, with some hesitation, the principle of absolute immunity. But it is of interest to note that in *The India* the Supreme Court of South Africa, in holding that a vessel owned by the Portuguese Government and, apparently, operated by it was immune from seizure, attached importance to the fact that she was not used for purely commercial purposes. The Court said: 'The conclusion I have come to is that ships, the property of a foreign State and used for public purposes, are not subject to attachment under an order of the local court. . . . In my opinion any use of a vessel for the purpose of obtaining revenue for the State is a public purpose, just as its use for the protection of the State is public' (*per* Gardiner J. at p. 464; *Annual Digest*, 1919-22, Case No. 105).

CHOICE OF LAW AND CHOICE OF JURISDICTION IN THE ENGLISH CONFLICT OF LAWS

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I. *The development and separation of the questions of choice of law and choice of jurisdiction*

SEVENTY-THREE years ago Frederic Harrison, in his perspective sketch of the conflict of laws of his day, observed: 'Private international law is solely concerned with the practice of tribunals.'¹ In 1951 leading American authorities on this subject stated the five matters which are dealt with in the conflict of laws as: jurisdiction of courts; foreign judgments; choice of law; jurisdiction to tax; and aliens and non-residents.² Between these two views of the scope of this subject stand opinions of the generality of English writers that the conflict of laws finds its uniformity in and is built up around three major topics, of which the first two receive the greatest emphasis: (1) Choice of law; (2) Choice of jurisdiction; (3) Recognition of foreign judgments.³

While certain writers realize that a problem in the conflict of laws may involve only one of these three questions,⁴ the assumption has been made by others, in a way which seems to raise it to a principle of law, that whenever a court is dealing with a question of conflict of laws it must necessarily consider both its own jurisdiction in the international sense and the choice of the appropriate law. Dicey, for example, formulates the statement in this way: 'Whenever a case containing any foreign element calls for decision, the Judge before whom it is tried must, either expressly or tacitly, find an answer to at least two questions before he can decide the dispute.'⁵ The first question is, has the English court jurisdiction? and the second, what, assuming the question of jurisdiction to be answered affirmatively, is the body of law to determine the rights of the parties?⁶ In the first edition

¹ *Jurisprudence and the Conflict of Laws* (edition of 1919), pp. 125-6.

² Cheatham, Goodrich, Griswold, and Reese, *Cases and Materials on the Conflict of Laws* (3rd ed., 1951), p. 1.

³ Dicey's *Conflict of Laws* (6th ed., 1949), p. 2; Cheshire, *Private International Law* (3rd ed., 1947), p. 8; Wolff, *Private International Law* (2nd ed., 1950), p. 9; Schmitthoff, *English Conflict of Laws* (2nd ed., 1948), p. 4; Graveson, *Conflict of Laws* (1948), p. 9.

⁴ E.g. Wolff, *op. cit.*, p. 9; Graveson, *op. cit.*, p. 9.

⁵ *Op. cit.*, p. 2.

⁶ Although Cheshire (*op. cit.*, p. 8) implies that the conflict of laws may be concerned with any one of the three questions in which this branch of law finds its unity, he takes Dicey's view in his formulation (pp. 8-9) that: 'We must be prepared to consider almost every branch of private law, but only in connection with two matters—jurisdiction and choice of law. The judge first decides whether he has power to adjudicate upon the case. . . . If the court decides that it possesses jurisdiction, then the next question, as to the choice of law, must be considered. . . .' Subject to

of his work on private international law Westlake expressed a similar view in these words: 'Private international law is the department of private jurisprudence which determines before the courts of what nation each suit should be brought and by the law of what nation it should be decided.' The fact, as Falconbridge has remarked,¹ that Westlake considerably modified this view in the second and subsequent editions of his book² would appear to justify an inquiry, belated though it is, into the complete accuracy of his original statement and of its present expression by modern authorities.

Of the general validity of the statement that English courts have gradually built up the conflict of laws on the general principle of the coexistence and mutual independence of the two broad unities of choice of law and choice of jurisdiction there is historically the strongest evidence. But because this branch of law, above all others, is a product of judicial ingenuity, because the English judicial technique is unsympathetic to an *a priori* approach, and, finally, because of the rarity (if not the complete non-existence), of absolutes in English law, we must accept notice that this general statement may need qualification. In reconsidering this topic we shall, therefore, have to advert particularly to two matters: first, the independence of the questions of choice of jurisdiction and choice of law; and secondly, the assertion, often made, that both questions are common to all conflict-of-laws problems.

In approaching a question such as this, which goes to the root of the conflict of laws, it may be of value to glance for a moment at the historical development of this branch of law in England. In medieval English law neither questions of choice of law nor of jurisdiction arose in the sense in which the terms are now used. If a particular remedy was sought, it had to be sought in proceedings before one particular court or another, and in that court only one possible system of law was available, the *lex fori*. The choices of jurisdiction and of law, in so far as they existed, were extra-forensic. They were made by the intending plaintiff, who had to decide, in respect of a particular matter, whether, for example, to proceed in the Court of Chancery for an equitable remedy or in the Court of Common Pleas for such relief as the common law afforded. Conflicts of jurisdiction between competing courts were conflicts in a true sense,³ not in the

the qualification that only one of these questions might arise in a given problem of private international law which did not involve litigation (see the writer's review of Cheshire, *Private International Law* (3rd ed., 1947), in *Journal of the Society of Public Teachers of Law*, 1 (New Series, 1948), p. 226), the writer in 1948 expressed a similar view to that of Dicey and Cheshire: see Graveson, *op. cit.*, p. 9. Even so limited, such a statement of the principle appears too wide.

¹ *Essays in the Conflict of Laws* (1947), p. 1.

² 'Private international law is that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different law.' Westlake, *A Treatise on Private International Law* (7th ed., 1925), p. 1.

³ Graveson, *op. cit.*, p. 19.

technical and lukewarm modern sense of the name of this branch of law.¹ Substantive law and substantive rights, whether arising in England or overseas, had to be fitted, if necessary by the use of fictions, into the frame of English forms of action and conform to the inexorable pattern of English procedure.

By the seventeenth century, however, elements of choice of law rules were developing, not only as between competing branches of English law in the wide sense² but in an international dimension. Thus, in *Greenway v. Barker*³ in the Court of Common Pleas, Dr. Steward argued: 'If contracts be made according to other laws, the same must be tried according to the law of that country where the contract is made.' To this assertion of the principle of *locus regit actum* Coke C.J. replied: 'If a contract be made in Paris in France, it shall be tried either by the common law or by the law of France, and if it be tried here, then those of France shall write to the Justices of England and shall certify the same unto them.'⁴ Towards the end of the century further decisions had strengthened the general idea of the application of foreign law to the merits of appropriate cases. Twisden, J. in 1670, dealing with the case of a ship which ran aground in Tuscany, observed: 'The judgment ought to be according to the foreign usage, some countries accounting one thing average, some another.'⁵ Proof of the law of slavery in Virginia was taken in *Smith v. Browne*⁶ in the same period.

By the middle of the eighteenth century the practice had become reasonably well established of seeking an answer to the problem of choice of law. The great influence of Lord Mansfield in this respect in *Robinson v. Bland*⁷ is well known. The importance achieved by the problem of choice of law at the beginning of the nineteenth century may be attributed to two chief causes, both of which were effective in breaking down the earlier common law doctrine that a choice of jurisdiction automatically carried with it the choice of the law of that jurisdiction.⁸ The first of these factors was the series of marriage cases which followed the passing of Lord Hardwicke's Marriage Act of 1753. That Act, it will be recalled, established formalities as to banns and length of notice of intention to

¹ Dicey, *op. cit.*, p. 7; Cheshire, *op. cit.*, p. 20.

² *Selden Society Publications* (Admiralty Cases), vol. xi, p. xlii. *Barker v. Maynard*, in which civil law, not common law, was held to apply to determine priority of two charges for debt on a ship. See also *ibid.*, p. xlix. The writer is indebted to his friend and colleague, Dr. A. K. Kiralfy, for these and certain other historical references used in this paper.

³ (1612), Godb. 260.

⁴ *Acc. Slany v. Cotton*, M. 22 Jas. I K.B., 2 Roll. Rep. 487, where it was said: 'Fuit agree, que les leys de auter nations in tiel case poet estre admitt in evidence coment auterment in pleader.' See also *Tucker v. Capps and Jones*, H. 22 Jas. I K.B., 2 Roll. Rep. 497.

⁵ *Gold v. Goodwin* (1670), 2 Keble 678.

⁶ Holt K.B. 495, 2 Salk. 666.

⁷ (1760), 1 W.Bl. 234, 2 Burr. 1078.

⁸ See *Cremer and Tookley's case* (1627), Godb. 385, 78 E.R. 227.

marry and at once gave rise to attempts to evade it by English couples who went to Scotland for the sole purpose of marrying under easier provisions of Scots law and then returned to England. It was emphatically established in these earlier cases¹ that the validity of the marriages was to be determined as to form by the law of Scotland, and the application of English law simply because the English court was exercising jurisdiction was not seriously maintained. In other words, the common law principle of governing the validity of the act by the law of the place where it was performed was projected in this field as well as that of commercial contracts beyond the barrier of jurisdiction and procedure into a principle of choice of law which must be applied by an English court. In resisting the temptation presented by these cases of runaway marriages to introduce a doctrine of evasion of the law,² English judges may be credited with a considerable achievement in establishing a strict rule of choice of law at the expense of the rule of choice of jurisdiction as it was then understood.

As we have seen, it was also partly through contract that the idea of choice of law as independent of that of choice of jurisdiction came into the English conflict of laws. The familiar case of *Robinson v. Bland*³ is less notable for its application of a choice of law rule, since instances of the principle of *locus regit actum* in this field can be found almost a century and a half earlier.⁴ Its importance lies more in the fact of being one of the earliest cases to modify the elementary rule of *locus regit actum* into the more refined doctrine of the proper law, albeit in an undeveloped form.⁵ Proper law was a legal concept which reflected the political and popular faith in individual liberty and freedom of the will, and it was through the extension of the concept of proper law in the nineteenth century that extensive development was made in the principle of choice of law.

To some extent a broadening of view in the common law courts took place in the seventeenth and eighteenth centuries in the recognition of foreign judgments, though here again one can find instances of the common law courts' recognition in the late sixteenth and early seventeenth centuries.⁶ Together with the instances of true application of a choice of law rule, the recognition of foreign judgments represents a contemporaneous development in this general broadening of the horizons of the common law between the seventeenth and nineteenth centuries.

¹ *Compton v. Bearcroft*, cited in note to *Harford v. Morris*, 2 Hagg. Cons. 444. See also *Dalrymple v. Dalrymple* (1811), *ibid.* 54; *Scrimshire v. Scrimshire* (1752), *ibid.* 395; *Swift v. Kelly* (1835), 3 Knapp. 257; *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

² Graveson in *Journal of Comparative Legislation* (Third Series), 19 (1937), p. 26.

³ (1760), 1 W.Bl. 234.

⁴ *Greenway v. Barker* (above).

⁵ See Beale, *Treatise on the Conflict of Laws* (1935), vol. ii, pp. 1092-5, and the writer's comments in *Lectures on the Conflict of Laws and International Contracts* (1951), pp. 2-3.

⁶ See *Jurado v. Gregory* (1669), 2 Keb. 511, 610; *Hughes v. Cornelius*, 2 Show. K.B. 232, K.B. roll. Trin. 32 Chas. II, m. 1229.

Because of the gradual and evolutionary process of judicial law-making there were in the nineteenth century, as there are today, certain fields in this subject in which no separation has been made between choice of law and choice of jurisdiction. There were and still are others in which one or other of these rules is completely undeveloped. In the first place, both at common law and in equity, though for different reasons, no separation of the two questions was made in actions relating to land.¹ Where equitable remedies were invoked in respect of foreign land they were applied on English principles of equity irrespective of the situation of the land, being conditioned by other considerations, such as the presence of the defendant for the purpose of jurisdiction *in personam*.² The practical basis of the jurisdiction was effectiveness and the only applicable law was English equity, largely because of the peculiar nature of the jurisdiction and the unique character, in an international sense, of the system of rules applied by the Court of Chancery. Even in the common law in actions affecting land no separation was made between the questions of choice of jurisdiction and choice of law, largely because jurisdiction was conditioned by the form of local actions and would not, therefore, be exercised over land outside England. Because of this procedural condition, which was generally effective until 1875,³ the need to separate the question of choice of law hardly arose. Where the court was dealing with English land English law automatically applied; and where a question of title to foreign land was involved the court lacked jurisdiction, and accordingly never reached the point of applying any system of substantive law.⁴ Where, however, an English court is dealing with contracts⁵ or wills⁶ relating to foreign land, the normal principles of choice both of law and of jurisdiction apply. Again, no question of choice of law has been raised in matters of divorce since the establishment of the Divorce Court in 1857⁷ simply because divorce jurisdiction is on principle confined to the courts of the domicile of the parties⁸ and the law of the domicile as their appropriate personal law happens to coincide with the *lex fori*.⁹ For similar reasons the English law relating to the

¹ But see the remarks of Coke C.J. in *Greenway v. Barker* (1612), Godb. 260, relating to *Sir Robert Dudley's* case.

² *Penn v. Baltimore* (1750), 1 Ves. 444; *Cranstoun v. Johnston* (1796), 3 Ves. 170; *In re Pollard* (1840), Mont. & Ch. 239; *In re Anchor Line*, [1937] Ch. 483.

³ Judicature Acts, 1873-5. See Graveson, *op. cit.* pp. 250-3.

⁴ *British South Africa Company v. Companhia de Mozambique*, [1893] A.C. 602. For exceptions to this principle see Graveson, *op. cit.*, pp. 253-60.

⁵ *British South Africa Co. v. De Beers Consolidated Mines* (1910), 80 L.J.Ch. 65; see also *Norris v. Chambers* (1861), 29 Beav. 246.

⁶ *Nelson v. Bridport* (1846), 8 Beav. 547; *Studd v. Cook* (1883), 8 App. Cas. 577; *In re the Duke of Wellington, decd.*, [1947] Ch. 506.

⁷ Matrimonial Causes Act, 1857.

⁸ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

⁹ The choice of law problem now raised by the statutory introduction of residence as a basis of divorce jurisdiction in the Acts from 1937 which culminated in the Matrimonial Causes Act, 1950, is considered below.

annulment of voidable marriages was innocent of any question of choice of law until this matter was first introduced in respect of the causes of impotence or wilful refusal to consummate a marriage in *De Reneville v. De Reneville*.¹ Admiralty jurisdiction² for damage provides another instance in which the rule of choice of law might properly be said to be submerged under the general principle of jurisdiction which exists over 'any claim for damage done by a ship.'³ The claim of generality in respect of maritime law may be thought to render unnecessary the operation of a choice of law rule. Whatever validity such a claim may have—or ever have had—it continues to support the exclusion of any choice of law rule.

In the development of the law of tort, the two questions under discussion have only partly been separated. Whenever the English courts exercise jurisdiction in tort English law is applied to the question of whether the act complained of constitutes a tort in the English sense in addition to its unjustifiable character by the law of the place of commission.⁴ Finally, one might note that the choice of jurisdiction always carries with it the choice of its own law of procedure; and when, as in the English sense, procedure includes so many matters, such as the measure of damages, onus of proof, set-off and counter-claim, limitation of actions, and statutory requirements of written evidence,⁵ the existence of the rule that procedure is governed by the *lex fori* creates an exception of major importance both to the existence of the two questions of choice of law and choice of jurisdiction and to their mutual independence. Savigny's theory⁶ of establishing for each kind of transaction a seat of the obligation which it created appears to have had little influence on the English development of the conflict of laws, for in the common law jurisdiction has depended only to a very small extent on the type of transaction involved. It has rested, as it still does by and large, on the liability of the defendant to service upon him of a writ in actions *in personam* and most actions *in rem*, or on the presence of tangible property within the jurisdiction in the case of actions *in rem*.

II. *Exclusive and non-exclusive jurisdiction*

It may be appropriate to consider two types of situation. The first is where in the English conflict of laws jurisdiction is exclusive or almost so.⁷ The other class consists of cases arising principally in contract and tort in

¹ [1948] P. 100. See further the writer's comments in *The Conveyancer and Property Lawyer* (1948), pp. 185 ff.

² Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (a) (iv).

³ *The Tolten*, [1946] 2 All E.R. 372. Graveson in *Modern Law Review*, 10 (1947), p. 306.

⁴ *The Halley* (1868), L.R. 2 P.C. 193; *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1; *Machado v. Fontes*, [1897] 2 Q.B. 231.

⁵ Statute of Frauds, 1677, s. 4; Sale of Goods Act, 1893, s. 4; Law of Property Act, 1925, s. 40; *Leroux v. Brown* (1852), 12 C.B. 801. See Graveson, *op. cit.*, pp. 273 ff.

⁶ *A Treatise on the Conflict of Laws* (Guthrie's translation, 2nd ed., 1880).

⁷ That is, the alternative possibilities of jurisdiction are regarded as exceptional; e.g. jurisdic-

which jurisdiction is largely unconnected with the facts of a particular case but depends, as in common law, chiefly on a procedural point, such as the presence of the defendant. It is notable that the extension of this common basis of jurisdiction to cases of absent defendants under Order 11, Rule 1, which was so exceptional in its nature as to be commonly called an assumed jurisdiction,¹ alone depends on some factual connexion of the case with England.

¶ In the first group of cases it appears that the fact that jurisdiction is exclusively referred to the courts of one particular legal system has generally so far overshadowed any possible question of choice of law as to render it in some cases non-existent and in most cases of very minor importance. Reference has already been made to the existence of jurisdiction in divorce and in matters affecting title to land, in both of which the choice of jurisdiction carries with it the application of the *lex fori*. The creation by statute of divorce jurisdiction on the basis of residence² raises interesting problems which the courts have not yet solved in respect of the application of the *lex fori* or of the personal law of the parties, which in these statutory exceptions is bound to be some other law than that of the court. The problem of choice of law thus appears for the first time in matters of divorce if the courts intend to adhere to the principle of governing the domestic status and rights of the parties by their personal law. In one case, however, the High Court dealt with the situation of a petition in England for divorce of parties who at the date of proceedings were Italian nationals domiciled in Italy by applying the *lex fori* as if they had been domiciled in England.³ To submerge under a principle of jurisdiction the application of the personal law in matters of divorce would be regrettable; but it is considered that this traditional exclusion of the choice of law rule under vastly changed bases of jurisdiction is not yet sufficiently established to debar the courts on a fuller consideration from determining the rights of parties by their personal law.⁴

With respect to nullity of marriage, the familiar distinction between proceedings in respect of a void marriage and those in which a marriage is alleged to be voidable is important in connexion with choice of law. In the former the well-established principles of choice of law governing the creation of a marriage, namely, that formalities are determined by the law

tion on the basis of residence in cases of divorce; jurisdiction in admiralty or in equity, probate, lunacy, and bankruptcy in certain matters affecting foreign land.

¹ In another context Lord Ellenborough's question might well apply: 'Would the world submit to such an assumed jurisdiction?' *Buchanan v. Rucker* (1808), 9 East 192.

² Matrimonial Causes Act, 1937, s. 13; Matrimonial Causes (War Marriages) Act, 1944; Law Reform (Miscellaneous Provisions) Act, 1944, s. 1; Matrimonial Causes Act, 1950, ss. 16 and 18.

³ *Zanelli v. Zanelli* (1948), 64 T.L.R. 556.

⁴ Graveson, 'The Recognition of Foreign Divorce Decrees', in *Transactions of the Grotius Society*, 1951.

of the place where the marriage is celebrated¹ and essentials by the domicile of each party at the date of marriage,² ensure that any decree declaring null a void marriage can only be pronounced after testing the defect alleged by reference to the appropriate choice of law rule. With this emphasis on the choice of law problem it is interesting to observe that jurisdiction is far from exclusive, being exercisable not only on the ground of domicile³ but also probably on that of residence of the parties,⁴ and where the marriage was celebrated in England and the defect relates to form, by the courts of the place of celebration.⁵ The position with regard to voidable marriages is very different. Here, a true question of change of status is involved, not merely one of declaring an existing status for which no judicial decree is strictly necessary.⁶ The annulment of a voidable marriage has partaken far more of the character of divorce and emphasis has accordingly been laid by the English courts on the exclusive nature of jurisdiction. Jurisdiction to annul a voidable marriage rests in principle with the court of the domicile of the parties⁷ though a possible exception may exist in favour of their common residence.⁸ Until *De Reneville's* case in the Court of Appeal no question of choice of law in the annulment of voidable marriages had been raised in the English courts, not only, perhaps, because of the emphasis on the choice of jurisdiction which appeared so strongly in *Inverclyde v. Inverclyde*⁹ but rather, it is suggested, because no question existed of the validity of the marriage in respect of form or essentials, but only the question of whether the grounds for nullity established by English law existed. Grounds for annulment of a voidable marriage had been treated by the English courts in the same manner as grounds for divorce, and just as no foreign ground for divorce could be imported into the English courts,¹⁰ so no foreign ground for annulment was admitted. In other words, both were treated in the nature of remedial or procedural matters and governed by the *lex fori*. The introduction by the Court of Appeal in *De Reneville's* case of the choice of law question in a limited form marks an exception which has been discussed elsewhere.¹¹ This whole question of the choice of law in voidable marriages has now been affected by the statutory introduction of a choice of law clause¹² which, by both its width in certain respects and narrowness in others, raises acute problems

¹ *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Apt v. Apt*, [1947] P. 127.

² *Brook v. Brook* (1861), 9 H.L.C. 193.

³ *White v. White*, [1937] P. 111.

⁴ *Mason v. Mason*, [1944] N.I. 134.

⁵ *Simonin v. Mallac* (above).

⁶ *De Reneville v. De Reneville*, [1948] P. 100.

⁷ *Inverclyde v. Inverclyde*, [1931] P. 29; *De Reneville v. De Reneville* (above).

⁸ *Hutter v. Hutter*, [1944] P. 95, and *Easterbrook v. Easterbrook*, [1944] P. 10.

⁹ Above.

¹⁰ Morris, *Cases on Private International Law* (2nd ed., 1951), p. 105.

¹¹ See *The Conveyancer and Property Lawyer* (1948), pp. 185 ff.

¹² Matrimonial Causes Act, 1950, s. 18 (3), re-enacting Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (4).

of its own.¹ In this respect it is in the tradition of most statutory attempts at provisions establishing rules of choice of law² and raises the doubt of whether parliamentary silence³ is not preferable to parliamentary action in this particular sphere. Satisfaction of the long-neglected need for expert advice on the implications in the conflict of laws of proposed statutory changes in the general law would do much to avoid such difficulties.

Again, in actions relating to land, jurisdiction is for the most part exclusively referred to the *lex situs* and for that reason not only does no question of choice of law arise, but it is unnecessary in the interests of an effective decision that it should. There are, however, a number of exceptional cases affecting land in which the jurisdiction of the courts of the *situs* is not exclusive. Examples are the construction of wills of land; the construction and validity of contracts for sale of land, and for marriage settlements which include land. In all these exceptional cases the issue is determined by the application of specific rules of choice of law based on the intention of the testator in the case of wills, on a presumed intention of the settler in the case of marriage settlements, and on the proper law in the case of contracts for sale. In other words, the normal situation in actions relating to land is changed by a move of emphasis from the choice of jurisdiction to that of law.

The second main class to which reference has been made are those cases in which jurisdiction is broad and in all of which the main issue is one of choice of law. Examples in the law of contract, tort, and succession will readily occur. On the consideration of these two broad classes it would seem that generally in any question litigated the problem before the courts is primarily either one of jurisdiction, where jurisdiction is exclusive or almost so, or one of choice of law where settled rules have been developed, but only rarely do both questions assume equal importance in the same case, while at times the existence of one question completely excludes the other.

In certain cases a well-defined rule of choice of law has carried with it the choice of jurisdiction. Order 11, Rule 1 (e) (iii), for example, gives jurisdiction to the English court in breach of contract where the defendant is outside the jurisdiction (and neither domiciled nor ordinarily resident in Scotland) when the contract is 'by its terms or by implication to be governed by English law'. Here is an instance of statutory character of a choice of law rule conferring jurisdiction.⁴ Its justification for so doing may well lie in the reason given by du Parcq L.J. (as he then was) when he remarked:⁵ 'I

¹ They are discussed by the writer in *International Law Quarterly*, 3, p. 371, at pp. 385-90.

² E.g. Wills Act, 1861. See generally Morris, 'Choice of Law Clause in Statutes', in *Law Quarterly Review*, 62 (1946), p. 170.

³ As in the Adoption Acts, 1926-49, which lay down only a rule of choice of jurisdiction.

⁴ See *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Journal 18; *Ocean S.S. Co. v. Queensland State Wheat Board*, [1941] 1 All E.R. 158.

⁵ *Ocean S.S. Co. v. Queensland State Wheat Board*, [1941] 1 All E.R. 158, at p. 165.

have always supposed that the justification of R.S.C. Order 11, r. 1 (e) (iii), is to be found in the fact that, where parties have agreed that their contract shall be governed by English law, it is convenient that courts familiar with that law should interpret and enforce the contract.¹ In certain other cases choice of law follows the choice of jurisdiction. Where, for example, the parties to a contract provide for any dispute to be settled by arbitration in England, their choice of jurisdiction is considered to constitute a choice of English law as the proper law which shall govern the validity of their contract.¹ Again, the Adoption of Children Acts, 1926 to 1949, established a strict rule of jurisdiction in respect of the powers of an English court to make an order of adoption. While the Acts are silent on any question of choice of law, it is more probable than desirable that such choice would be in favour of English law,² despite the fact that jurisdiction may be exercised on a basis of residence of the adopter and the infant, even though the adopter is domiciled in Scotland and the infant is domiciled in neither England nor Scotland. So far the courts have not had to settle the choice of law question involved in adoption.

It is also noteworthy that every rule of jurisdiction in the English conflict of laws depends on the application of a choice of law rule in the important sense that characterization (in matters of jurisdiction at least) is governed by the *lex fori*. In other words, the English court determines according to the concept of English law, normally in its narrower sense, what it means by such terms as jurisdiction, *situs*, domicile, and the place where an act is done. These incidental or preliminary questions of characterization may well affect vitally the ultimate issue of a case, whether in the exercise or refusal of exercise of English jurisdiction, or in the recognition or otherwise of foreign judgments. Conflict in this respect between English and foreign law may arise in many forms. It may appear in the location of the place of making a contract by correspondence³ or by telephone; in the *situs* of a debt;⁴ in characterization as movable or immovable for purposes of jurisdiction⁵ of title deeds situated in one country to immovable property in another.⁶ But its most decisive and conspicuous effect has appeared in the law of divorce, in which the statement of the rule that English law will

¹ *Hamlyn v. Talisker Distillery Co.*, [1894] A.C. 202; *N.V. Kwik Hoo Tong Handel Maatschappij v. James Findlay and Company*, [1927] A.C. 604. See the writer's comments in *Lectures on the Conflict of Laws and International Contracts* (1951), pp. 26-27.

² Cf. Dicey's Rule 123 (1), which is a suggestion far more in accord with general principles. A likely distinction could be made between the exercise by English courts to make an order of adoption, when English internal law would probably be applied, and the recognition by English courts of the status of adoption acquired abroad, to which Dicey's test would probably be applied (Dicey, *op. cit.*, p. 511).

³ *Ibid.*, p. 599.

⁴ *New York Life Insurance Co. v. The Public Trustee*, [1924] 2 Ch. 101.

⁵ Beale, *op. cit.*, vol. iii, p. 1479; Dicey, *op. cit.*, p. 522.

⁶ Cowan gives other instances in his paper on 'Indeterminacy in the Conflict of Laws', *The Conflict of Laws and International Contracts* (1951), p. 142.

only recognize the decrees of courts of the domicile of parties¹ is incomplete unless one adds the rider that domicile means domicile in the English sense and no other.² In this way the English rule of jurisdiction and of recognition of foreign judgments is founded decisively on an English choice of law rule in favour of English characterization.

Theoretically and legally questions both of choice of law and of jurisdiction should be considered in any matter involving the conflict of laws which comes before the courts, and a discussion of the numerous cases in which either one or other of these questions has been ignored or overshadowed does not affect the many cases in which both questions have arisen. In the generality of coexistence of the two principles lies the justification for the general expressions of principle mentioned earlier in this paper. But because in any case the argument, the evidence, and, to a great extent, the judgment are conditioned by the pleadings, because the issue between the parties often rests on *either* a point of law *or* a point of jurisdiction and far less frequently on both, and because the judicial technique implicit in the doctrine of precedent confines the judge to a decision of the minimum required to dispose of the issue—for all these reasons a lack of balance between the questions of choice of law and of jurisdiction in the individual case has been reflected in the general body of law. The individual decision in this field often constitutes the whole or almost the whole law on the particular point with which it deals. This result obviously does not *ipso facto* deny the coexistence of both questions but derives from the incompletely developed state of the English conflict of laws. To acknowledge this state is the first step towards its remedy.

The consideration of both questions, with varying emphasis, appears in many fields, for example in certain branches of domestic relations, such as custody of infants³ and those cases of annulment in which the grounds alleged are impotence and wilful refusal to consummate⁴. As has been indicated elsewhere, questions of choice of law have only recently been raised in the latter sense.⁵ Even where the question of choice of law in matters of annulment has been raised, only half the question has been answered; the courts have dealt with what law should govern, but not with the question of the date as of which such law should be taken.⁶

¹ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

² *Shaw v. Gould* (1865), L.R. 3 H.L. 55; *Re Martin*, [1900] P. 211; *Re Annesley*, [1926] Ch. 692.

³ *Re B.'s Settlement*, [1940] Ch. 54; *Re Dulles' Settlement Trusts*, [1951] 2 All E.R. 69.

⁴ *De Reneville v. De Reneville*, [1948] P. 100; *Casey v. Casey*, [1949] 2 All E.R. 110.

⁵ See the writer's comments in *The Conveyancer and Property Lawyer* (1948), pp. 185-202. In *Easterbrook v. Easterbrook*, [1944] P. 10, and *Hutter v. Hutter*, [1944] P. 95, the only question was one of jurisdiction.

⁶ Graveson, 'Jurisdiction, Unity of Domicil and Choice of Law Under the Law Reform (Miscellaneous Provisions) Act, 1949', in *International Law Quarterly*, 3 (1950), p. 371, at pp. 386-8.

III. *The conflict of rules of choice of law and choice of jurisdiction*

On general grounds it would seem sound to suggest that the question of choice of law is more important than that of choice of jurisdiction. It is more in the interests of uniformity of decision, of justice, and of the parties themselves that the proper law should be applied to the merits of their dispute than that some law should be applied by the courts of one country rather than those of another. Yet the result of case law not only in English courts, but far more widely, would seem to raise the question of choice of jurisdiction to the higher degree of importance. The clearest and most obvious instance in which this relation appears is in the law relating to the recognition of foreign judgments. Where jurisdiction is properly exercised by a foreign court it would not seem to matter legally (according to English decisions) whether or not the choice of the general system of law applied is correct, whether or not the choice of the particular rule of law from that system is correct, whether or not the foreign court makes a mistake of fact, of its own law or of English law.¹ This exaggerated emphasis on a strict choice of jurisdiction has blinded English courts, in their anxiety to uphold the principle of *res judicata*, to the inherent absurdity of enforcing a foreign judgment which is known to be contrary to English law. The courts will reopen only on the allegation of fraud a final and conclusive judgment given in a foreign court.² Behind this strictly limited power to reopen foreign judgments lies the idea of comity and judicial infallibility. To reopen a case on the ground of fraud is to set right a deceit practised on a foreign court, for while one may show that a foreign court was misled one may not undertake what would usually be the simpler task of showing that it was mistaken.³ French courts generally do not take such a tender view of the sensitive dignity of courts foreign to them. In proceedings for *exequatur* they will, if they think fit, tear open a foreign judgment from top to bottom, whether or not any allegation of fraud has been made.⁴ It is little comfort to a defendant in proceedings in England for the enforcement of a foreign judgment to be told that the mistake of law of a foreign court is treated here as a mistake of fact, and that in the absence of further evidence the trial court's findings of fact are conclusive. One may well question the need for perpetuating the injustice involved in enforcing in England a foreign judgment based on a mistake of law, at least of English law, for in such cases the defendant is prejudiced no less than in cases of fraud on the foreign court.

¹ See judgment of Blackburn J. in *Godard v. Gray* (1870), L.R. 6 Q.B. 139, 150; and see *Ellis v. M'Henry* (1871), L.R. 6 C.P. 228; *Castrique v. Imrie* (1870), L.R. 4 H.L. 414.

² *Vadala v. Lawes* (1890), 25 Q.B.D. 310; *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295; *Syal v. Heyward*, [1948] 2 All E.R. 576; and the writer's note in *Modern Law Review*, vol. 12, p. 105.

³ *Abouloff v. Oppenheimer* (above).

⁴ Wolff, *Private International Law* (2nd ed., 1950), p. 272.

The converse of this situation appears in those cases in which a foreign court, according to the English rules of conflict of laws, improperly assumes jurisdiction. Even if in English law the rules of jurisdiction of English and foreign courts were identical—and incongruously they diverge on several important points, such as voluntary submission¹ and jurisdiction over absent defendants²—the present rule would still obtain that where jurisdiction is improperly assumed by a foreign court according to the English conflict of laws (whatever may be the view of the law of the foreign court itself), the judgments of that court will not be recognized in England, even though the foreign court may have applied what is, according to English law, the proper law.³

The most striking and familiar example of this situation appears in the judicial application of the Full Faith and Credit Clause of the United States Constitution which, it will be recalled, requires that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State'.⁴ It is striking because of the broad general uniformity of law throughout the United States, despite the many regional variations which exist. Over this system has been laid the principle of constitutionally delimited jurisdiction. In the result, as many well-known cases show, no recognition whatever will be given by the courts of State A to a judgment pronounced by the courts of State B if, in the opinion of the courts of State A (and in the last resort in the opinion of the United States Supreme Court) the courts of State B had no jurisdiction over the matter.⁵ It would seem to make no difference that the trial court applied either its own law or the law of State A, or that it had the advantage of seeing and hearing the parties and their witnesses. Its decision in law and its findings of fact will equally be denied recognition, including even its finding that it possessed jurisdiction over the issue.⁶ While it is not the purpose of this paper to discuss the Full Faith and Credit Clause of the United States Constitution, that clause provides at least an example of the restrictive interpretation of a provision relating to recognition through placing emphasis on the choice of jurisdiction to the complete exclusion of the choice of law. The requirement that full faith and credit be denied is not, after all, a requirement that all faith and credit be denied, yet it is in the latter sense that this article has been interpreted by the courts.⁷ The

¹ *Harris v. Taylor*, [1915] 2 K.B. 580; but cf. judgment of Denning L.J. in *Re Dulles' Settlement Trusts*, [1951] 2 All E.R. 69.

² Order 11, R. 1, R.S.C.

³ *Keyes v. Keyes*, [1921] P. 204. See Graveson, *op. cit.*, pp. 313-14.

⁴ Article IV, para. 1.

⁵ See Beale, *Treatise on the Conflict of Laws* (1935), vol. i, p. 326, and numerous cases there cited.

⁶ *Williams v. North Carolina*, 325 U.S. 226 (1945).

⁷ See the writer's comments on '*Boardman v. Boardman* through English Eyes', in *Connecticut Bar Journal*, 23 (1949) p. 175; and '*White v. White*', *ibid.* 25 (1951).

law relating to the recognition of foreign judgments, both in England and in the United States, is concerned almost exclusively with questions of choice of jurisdiction.

A more liberal approach to the question of recognition of foreign judgments is found in several continental countries, particularly in the law of domestic relations. In Germany, for example, jurisdiction of the courts other than those of the nationality of the parties, if the latter are German nationals, will be recognized, provided that the German choice of law rule in favour of the national law is followed.¹ Dr. Cheshire, stigmatizing the present confusion of jurisdiction and choice of law,² has advocated in English law a closer attention to the application of the appropriate choice of law rule in matters of annulment of marriage as against the present obsession with questions of jurisdiction.³ Many arguments could be adduced in favour of such a view.⁴ There seems no reason, for example, to limit the decision in *Armitage v. Att.-Gen.*⁵ to the recognition of the jurisdiction of foreign courts, a field in which it has been usefully employed in many common law countries,⁶ though not without criticism.⁷ Its extension to the problem of choice of law might well have a valuable and liberalizing tendency in those cases in which the choice of law rule is unnecessarily strict and narrow.⁸

One cannot justify the preponderance of the question of choice of jurisdiction over choice of law or vice versa without some attempt to assess first the relative importance of the two questions. Procedure admittedly provides the frame for substantive law and fixes its pattern; but it is the substantive law which determines the rights of individuals, even though such rights can only be enforced through procedural machinery. Substantive law is thus the end to which procedure is the means, and certainly in popular thought parties are more concerned that any dispute between them should be determined on the merits according to the substantive law properly applicable rather than that this court or that should have exclusive jurisdiction. 'It matters little where the machinery is put in motion,' writes Cheshire,⁹ 'provided that the correct law is applied.' In so far as the conflict of laws is a projection into space of the municipal system of which it forms

¹ Rabel, *Conflict of Laws*, vol. i (1945), pp. 471-6.

² *Private International Law* (3rd ed., 1947), p. 440.

³ *Ibid.*, p. 447.

⁴ Some of them are set out in 'The Recognition of Foreign Divorce Decrees' in *Transactions of the Grotius Society*, 37 (1951).

⁵ [1906] P. 1935.

⁶ Falconbridge, *op. cit.*, pp. 617 ff.; Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942), pp. 464-5.

⁷ Particularly by Morris in *Canadian Bar Review* 24 (1946), p. 73.

⁸ Cook, *op. cit.*; Graveson in *Transactions of the Grotius Society*, 37 (1951). See also *Gould v. Gould* (1925) 235 N.Y. 14.

⁹ *Op. cit.*, p. 447.

part, it has both felt and satisfied the need for extended categories and definitions of its concepts. The English courts have accordingly recognized legitimation by subsequent marriage¹ for years before this concept was introduced by statute² into English municipal law. They have accepted as of a contractual nature an obligation not under seal and unsupported by consideration;³ they have entertained as plaintiff a non-existent foreign corporation;⁴ and they have accepted the idea of a marriage by proxy as sufficient to confer the status of married woman on a person domiciled and resident in England at all material times.⁵ The categories of substantive law have thus expanded to meet the requirements of this new international dimension, and to this extent W. W. Cook, in urging the need for such extended categories and relative and functional interpretation of rules and concepts,⁶ was preaching to the converted. If some of the present difficulties in the conflict of laws arise from the fact that the substantive law is still finding difficulty in breaking through the barriers of procedure, they do so even more from the fact that procedure, and particularly rules of jurisdiction, have not extended their categories in any degree commensurate with substantive law. The ancient principles of jurisdiction both at common law and in equity are still broadly followed except in those matters in which they have been extended by statutory authority: that is, under Order 11, Rule 1, R.S.C. The creation of cases of hardship by the strictness of rules of jurisdiction is well known in the law of divorce⁷ and nullity,⁸ and here it has required the intervention of statute⁹ to extend this jurisdiction.

Dicey's general principle of effectiveness¹⁰ is based on such practical and sound common sense that it will continue to govern in the future as it has done in the past the English rules of jurisdiction. Within the limits which it establishes, however, much room is left for reform. In the first place, a more even balance might be achieved between the questions of choice of jurisdiction and choice of law, so that neither tends to overshadow or obliterate the other on any particular issue before the courts. Secondly, in those cases where at present jurisdiction is exclusive or very narrow, cases in which, as has been shown, the question of choice of law is either non-existent or insignificant, the emphasis should move from the question of

¹ *In re Grove* (1887), 40 Ch.D. 216; *In re Goodman's Trusts* (1881), 17 Ch.D. 266.

² Legitimacy Act, 1926.

³ *In re Bonacina*, [1912] 2 Ch. 394.

⁴ *Lazard Brothers & Co. v. Midland Bank Ltd.*, [1933] A.C. 279.

⁵ *Apt v. Apt*, [1947] 1 All E.R. 620.

⁶ *The Logical and Legal Bases of the Conflict of Laws* (1942), pp. 155 ff.

⁷ *Stathatos v. Stathatos*, [1913] P. 46; *De Montaigne v. De Montaigne*, [1913] P. 154; *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; *Att.-Gen. for Alberta v. Cook*, [1926] A.C. 444.

⁸ *Ogden v. Ogden*, [1908] P. 46; *Inverclyde v. Inverclyde*, [1931] P. 29.

⁹ Matrimonial Causes Act, 1937, s. 13; Matrimonial Causes (War Marriages) Act, 1944; Law Reform (Miscellaneous Provisions) Act, 1949, s. 1; Matrimonial Causes Act, 1950, s. 18.

¹⁰ Op. cit., p. lxx.

jurisdiction to that of substantive law. This is particularly the case in divorce and annulment of voidable marriages, although in these cases it is necessary to ensure that effect is given to English standards in domestic relations and morality where the personal law of parties is English. A strict application of the personal law by any court would ensure this result. Such a general transfer of emphasis to the question of choice of law, however, would have its dangers unless it were accompanied by a change in the English rules relating to the recognition of foreign judgments and decrees. For an emphasis on the choice of law implies that the law chosen is not only the appropriate system, but is correctly interpreted and applied. It should, therefore, be a defence and a bar to the recognition of a foreign decree that it was pronounced on a mistaken application of the proper law, whether that law be English or some other. Thirdly, with a fuller realization of the incompleteness of the conflict of laws, courts and Parliament should be prepared to fill the gaps in the field of both jurisdiction and substantive law as those gaps become known.¹

The application of a rule of choice of law itself may be more complex in certain cases than courts have at times realized. Particularly in cases of reference to the personal law of an individual it sometimes becomes necessary to reconcile the English conception of personal law, as based through domicile on some territorial legal unit, with the oriental conception of personal law, based on adherence to a particular religion or a particular community.² In such cases reconciliation between the territorial and personal planes of law could be achieved in two stages: first, by a reference to the territorial personal law in order to determine whether by that law ascertained on the principles of the English conflict of laws any other personal law, such as a religious law, is allowed to operate locally; secondly, if the answer to the first question is in the affirmative, the discovery and application of the personal religious law.³ In a different sense the double choice of law rule which exists in the law of tort presents few problems of this kind, for the courts have been able to work out the cumulative test entirely on a territorial basis, and one with which they are most familiar. In one case at least, as has been stated elsewhere,⁴ a broader view of the concept of personal law itself may be desirable, a view which, in cases of divorce and the annulment of voidable marriages, would within limits accept nationality as a basis of personal law. This would greatly assist

¹ For example, a choice of law rule in divorce when jurisdiction is exercised on the basis of residence; in adoption of infants; and in capacity to acquire a domicile. On the last point see the writer's comments in *International Law Quarterly*, 3 (1950), pp. 149 ff.

² While personal laws are normally of a religious character they are not necessarily so, e.g. the Adat law of Indonesia: see Kollewijn in *International Law Quarterly*, 4 (1951), p. 307.

³ See further Graveson, 'The Recognition of Foreign Divorce Decrees', in *Transactions of the Grotius Society*, 37 (1951).

⁴ Loc. cit.

a just recognition of foreign decrees in which either jurisdiction or substantive law, or both, were according to the foreign law properly based on nationality. English decisions, in recognizing decrees made by the courts of the nationality of parties, provide some support for such a view.¹

Conclusions ✓

We may now attempt a tabular reformulation of the general principles stated at the beginning of this article and their qualifications as subsequently developed.

1. The English conflict of laws is concerned with three questions:
 - (a) the choice of jurisdiction;
 - (b) the choice of law; and
 - (c) the recognition of judgments of foreign courts.
2. Of these three questions, (a) and (b) are the most frequent and important. Question (c) is a corollary to question (a), but not to question (b). In this respect question (c) is not independent of question (a).
3. In a broad sense questions (a) and (b) are mutually independent. But
 - (a) the question of choice of jurisdiction is dependent on that of choice of law in the following matters:
 - (i) characterization of the concept of jurisdiction and of the several concepts on which jurisdiction in particular branches of law is based;
 - (ii) the express or implied choice of English law to govern a contract—Order 11, R. 1 (e) (iii).
 - (b) The question of choice of law is dependent on that of jurisdiction in the following matters:
 - (i) actions relating to land in respect of title, disposition, and trespass, both at common law and in equity;
 - (ii) proceedings in divorce and, to a limited extent, in annulment of voidable marriages;
 - (iii) actions in respect of contracts containing an arbitration clause in favour of English arbitration;
 - (iv) actions in tort so far as concerns the test of whether the act committed abroad conforms in character to a tort in the English sense;
 - (v) Admiralty damage actions;
 - (vi) the law of procedure.
 - (c) In matters other than those mentioned in sections (a) and (b) of this paragraph, the questions of choice of law and choice of jurisdiction are mutually independent in the sense that a decision on one in favour of a particular legal system has no influence on a decision relating to the other in favour of the same or a different legal system.
4. Questions of choice of law play no part in the recognition of foreign judgments, other than indirectly and exceptionally
 - (a) on an allegation that the foreign judgment has been obtained by fraud; or

¹ *Mezger v. Mezger*, [1936] 3 All E.R. 130. See also *Pastre v. Pastre*, [1930] P. 80.

- (b) that its enforcement in England would be contrary to some overriding consideration of English law such as public policy, natural justice, morality, or international comity.
- 5. (a) In a normal case before the English courts questions both of choice of jurisdiction and choice of law and choice of jurisdiction and the recognition of foreign judgments will arise (but not questions of choice of law and the recognition of foreign judgments). In the exceptional case noted in paragraph 3 (a) (ii) the only substantial question will be one of choice of law; and in the exceptional cases noted in paragraph 3 (b) the only, or only substantial, question will be one of choice of jurisdiction.
- (b) In a conflict of laws problem involving neither actual nor prospective litigation either question, (a) or (b), may arise independently of whether or not the other question arises.

Writers and judges alike have stressed from time to time that the justification for the existence of rules of choice of law is the need to do justice as the courts of any country see it.¹ But the rules of choice of law developed on this basis and with this purpose will only become fully effective if the rules of choice of jurisdiction allow them to do so. The general development of rules of jurisdiction is far behind that of rules of choice of law, for while the latter have largely developed in the course of the past century, the former stretch back to the Middle Ages. A modernization of the rules of choice of jurisdiction to remove some of the antiquated barriers which now stand between the litigant and the substantive law applicable to his case might contribute more than anything else to the development of the English conflict of laws.

¹ E.g. Dicey, *op. cit.*, p. 6.

VALIDITY OF THE ACTS OF THE BELLIGERENT OCCUPANT

By FELICE MORGENSTERN, M.A. (Cantab.)

THE problem of the relationship of international law and municipal law is usually studied in connexion with the normal functioning of the legal system of a state in time of peace. However, it also has an important bearing on the powers and functions of a belligerent occupant in the territory occupied by him. These have been formulated, in some detail, in Section III of the Regulations annexed to the Fourth Hague Convention of 1907 concerning the Laws and Customs of War on Land. The question has arisen, in the first instance, whether these Regulations are part of municipal law, and, in particular, whether they must be considered to confer rights and impose duties upon individual inhabitants. Secondly, the question of the legal effect of acts which are contrary to international law has been of particular importance in this connexion. The wider and significant problem which underlies these questions is the problem of the nature of the power of the belligerent occupant—the question whether that power is derived from international law or is based merely on force. Accordingly, it is proposed to examine in this article first, the effects, within the sphere of municipal law, of the Hague Regulations in general, and secondly, the question of the effects, in municipal law, of the violation of the Regulations.

I. *The municipal effects of the Hague Regulations*

(a) *The necessity of express transformation into municipal law*

The first of these problems can be examined from several aspects. On the one hand, the question arises whether the Hague Regulations have acquired the force of law in occupied territory,¹ by reference both to the requirement of 'transformation' and to the necessity of legislation in the case of so-called 'non-self-executing' provisions of international law. There seems to be little doubt that in the view of municipal courts the Hague Regulations cannot now be denied enforcement in the municipal sphere on account of either of these obstacles.

Transformation has occasionally been required. A striking example of

¹ The question whether the Hague Regulations are binding in the municipal sphere is, as a rule, raised before municipal courts of the occupied territory. It has never been found necessary to inquire whether the organs of the occupant are likewise bound by the Hague Regulations. That question is probably of little practical importance seeing that the Hague Regulations are, in fact, generally regarded as municipally enforceable. Moreover, it may be academic in that the organs of the occupant may lack the power to scrutinize his orders in the light of international law. See, for an expression of the view that the courts of the occupant cannot review his acts, *Chan Taiik v. Ariff Moosejee Doolly and Another*, [1948] S.C.R. 454, decided by the High Court of Burma on 23 June 1948.

this is provided by Belgian jurisprudence of the First World War.¹ However, more frequently courts have acted by reference to the view that the Regulations are declaratory of rules of customary international law and are, accordingly, covered by the general 'adoption' of these rules. That was the opinion of a Court of first instance of Manila, in the case of *Hongkong and Shanghai Banking Corporation v. Luis Perez-Samanillo, Inc., and Register of Deeds of Manila*,² decided on 14 October 1946. Before reviewing the validity of the currency legislation of the Japanese occupant in the light of international law, the Court stressed that the Philippine Commonwealth had adopted the Hague Regulations as part of the fundamental law of the land in pursuance of Article 11 of its Constitution, which provides that 'the Philippines . . . adopt the generally accepted principles of international law as part of the law of the nation'. A similar view was expressed by the High Court of Burma in *The King v. Maung Hmin*,³ decided on 11 March 1946. In that case the Court was called upon to determine the validity of judgments given during the occupation by courts established by the occupant. It rejected the contention that this was a matter to be determined exclusively by municipal law. It did so on the ground that there is no sharp dividing line between municipal law and international law. By reference to the principle, enunciated in *West Rand Central Gold Mining Co., Ltd. v. The King*,⁴ that international law is part of the law of the land, it held that 'the Hague Regulations must be treated by the Courts of Burma as incorporated into the municipal law of Burma'. The decision of the Supreme Court of Austria in *Austrian Treasury (Postal Administration) v. Auer*⁵ may also be cited in this connexion. This was an action by the

¹ The Fourth Hague Convention was approved in Belgium by a law of 25 May 1910, which provided that the Convention was to have 'full and complete effect in Belgium'. In a decision of the Belgian Court of Cassation of 20 May 1916 it was held that legislation of the occupant which was in accordance with Article 43 of the Hague Regulations was legally binding 'non que l'occupant tienne de sa force le pouvoir législatif en pays occupé, non que ces mesures cessent d'être autre chose que des ordres d'une autorité militaire étrangère ou qu'elles aient la vertu de produire par elles-mêmes et sans la sanction du pouvoir légal quelque effet en droit, mais uniquement parce qu'une loi belge le prescrit . . .' (*De Ridder-Tartarin v. Procureur du Roi, Clunet*, 47 (1920), p. 727).

Where the Hague Regulations have become part of the law of the land by a process of transformation the danger arises that they can be made inapplicable by the legislation of the lawful sovereign. This was the conclusion drawn by Professor de Visscher (in *Law Quarterly Review*, 34 (1918), p. 79) from the above-cited decision of the Belgian Court of Cassation and a further decision of the same Court of 14 June 1917 to a similar effect. It is, however, controversial whether the lawful sovereign-in-exile can enact such legislation with effect binding on the occupied territory.

² *Annual Digest and Reports of Public International Law Cases*, 1946, Case No. 157.

³ [1946] *Rangoon Law Reports* 1; *Annual Digest*, 1946, Case No. 139. The relevant passage was referred to with approval in *Chan Taik v. Ariff Moosejee Dooply and Another*, [1948] S.C.R. 454.

⁴ [1905] 2 K.B. 391. See also *Aboitiz & Co. v. Price* (99 F. Supp. 602), decided by the United States District Court for Utah on 16 June 1951.

⁵ *Annual Digest*, 1947, Case No. 125.

Austrian Postal Administration for the recovery of a vehicle which had been lawfully seized by Russian forces and later sold to an Austrian purchaser. The Court held that Austrian law was applicable to the question whether the purchaser had acquired a title valid against the Austrian Government, and that the Hague Regulations had become part of Austrian law by virtue of the principle of the Constitution that 'the generally recognised rules of international law are part of the law of the Republic'.

(b) *The legal character of the Hague Regulations*

Again, the provisions of Article 1 of the Fourth Hague Convention suggest that the Regulations annexed thereto are not self-executing. It is laid down that

'The High Contracting Parties will issue to their armed land forces instructions which shall be in conformity with the "Regulations respecting the Laws and Customs of War on Land" annexed to the present Convention.'

It might be argued that, by implication, these Regulations are not intended to be directly enforceable. However, the requisite steps have generally been taken. No case is known to the writer where effect was denied to the Hague Regulations on the ground that they had not been made enforceable in the municipal sphere.

On the other hand, it has been suggested that the section of the Regulations which bears on belligerent occupation does not, in substance, concern itself with the rights and obligations of individuals, but is intended exclusively to limit the factual power of the occupant. This has been the view, notably, of Dutch courts in a number of cases in which Dutch nationals were accused of performing services on behalf of the enemy. In *Re Contractors Knols*,¹ decided on 2 December 1946, the Special Court of Cassation held that the fact that the Regulations had the force of law in Holland 'did not imply that, in a Dutch court, Dutch citizens could, in order to avoid conviction on a charge of aiding the enemy, rely on the contention that—whatever the factual circumstances might have been—they were justified in performing such acts for the benefit of the enemy as the enemy was entitled, according to the Regulations, to demand from them'. In *Re Contractor Worp*² the same Court held, on 15 July 1946, that the liability to punishment of citizens of an occupied country under provisions directed against assistance to the enemy in cases falling under Article 52 of the Hague Regulations was not governed by the Regulations, but by the general principles of national penal law such as those relating to *force majeure*. In *Re van der Giessen*,³ decided on 21 June 1948, the Court again

¹ *Na-oorlogse Rechtspraak*, 3rd year (1947), No. 725; *Annual Digest*, 1946, Case No. 144.

² *Na-oorlogse Rechtspraak*, 2nd year (1946), No. 519; *Annual Digest*, 1946, Case No. 145.

³ *Na-oorlogse Rechtspraak*, 5th year (1949), No. 1381. With that case, in which the defendant

affirmed that Dutch citizens could not plead, in answer to a charge of collaboration with the enemy, that the occupant was, by international law, entitled to demand from them the services they had rendered. In *Re Van Huis*,¹ decided on 15 November 1946, the Special Criminal Court at The Hague held that 'the Regulations on the Laws and Customs of War on Land were intended to curtail the powers of the enemy over occupied territory, and not to define his rights against the population. Consequently legislative measures of the occupant did not, in general, create legal obligations for the inhabitants.'

(c) *The nature of belligerent occupation*

In a sense these cases deny the legal character of belligerent occupation, and regard it merely as an exercise of force. That is a view which has been endorsed by some writers² and, occasionally, by municipal courts in a different context. Thus the Court of Appeal of Liège held in the case of *Mathot v. Longué*, decided on 19 February 1921, that a law enacted by the German occupant could not invalidate a contract made in breach of its provisions. Using phraseology which was out of step with earlier decisions of the same Court and with Belgian jurisprudence in general, the Court said: 'it is inaccurate to say that by virtue of the [Hague] Convention the occupant has been given any portion whatever of the legislative power; . . . it appears from the text of the Convention itself and from the preliminary work that all that was intended . . . was to restrict the abuse of force by the occupant, and not to give him or recognise him as possessing any authority in the sphere of law.'³ It follows from that attitude that services on behalf of the occupant, even where the latter was permitted by the Hague Regulations to demand them—and it should be noted that the above-mentioned Dutch cases, despite the generality of their language, were concerned with services which the occupant was not, under the

had, on the order of the occupant, completed war-vessels which were under construction at his shipyard, may be compared the case of *The Adelaide Star*, decided by the Supreme Court of Denmark in 1948 on similar facts (*Annual Digest*, 1948). The Court there held that the conditions of occupation were such that the requisitioning could not have been prevented, and that the shipyard was not liable.

¹ *Na-oorlogse Rechtspraak*, 2nd year (1946), No. 605; *Annual Digest*, 1946, Case No. 143.

² See the authorities cited by Baxter in this *Year Book*, 27 (1950), at p. 243. That view seems to have been strongly influenced by dualist principles; see, in particular, Oppenheim in *Law Quarterly Review*, 33 (1917), p. 367; de Visscher, *ibid.* 34 (1918), p. 79; van Nispen tot Sevenaer, *L'Occupation allemande pendant la dernière guerre mondiale* (1946), at p. 204. It has already been shown that there is no difficulty in regarding the Hague Regulations as applicable in the municipal sphere.

³ *Annual Digest*, 1919-22, Case No. 329. See also *Collot d'Escury v. Levensverzekering-Maatschappij Utrecht Ltd.* (*Na-oorlogse Rechtspraak*, 4th year (1948), No. 1309 g), decided by the Judicial Division of the Council for the Restoration of Legal Rights at The Hague on 30 April 1948. In that case the Court held that a German Ordinance enacted in occupied Holland, which provided that enemy property must be declared, imposed no legal obligations on the inhabitants of the occupied territory even though it was in accordance with international law.

Hague Regulations, entitled to demand¹—are justified only when the actual force at the command of the occupant allows of no choice.² It is open to doubt whether that view of the nature of belligerent occupation is correct. The Hague Regulations have not only placed legal limits on the factual power of the occupant, but have, by inference, recognized certain rights and have imposed upon him positive duties in relation to the population.³ Both in justice and in legal logic it would seem to follow that the population is under a legal obligation to obey the lawful orders⁴ of the occupant.⁵ This was stressed by the Belgian Court of Cassation in the case of *De Ridder-Tartarin v. Procureur du Roi*, decided on 20 May 1916. With reference to the question whether legislation of the occupant establishing special tribunals, which was held to be in accordance with Article 43 of the Hague Regulations, was legally binding, the Court said:

‘. . . les traités internationaux lient les juges de chacune des parties contractantes comme tous les ressortissants de ces parties et doivent, comme tout contrat, être exécutés de bonne foi et quelles que soient les conséquences de leur exécution. . . . Le règlement annexé à la quatrième Convention de La Haye fait partie intégrante de cette Convention. L’article 43 de ce règlement impose à l’autorité militaire de l’occupant l’obligation de prendre des mesures pour cet objet limitativement désigné, qui est d’assurer et de rétablir la vie publique dans le territoire occupé de l’État ennemi. A moins de supposer que les hautes parties contractantes, chose inadmissible, aient entendu faire œuvre vaine et sans résultat pratique, il faut reconnaître qu’à cette obligation imposée à l’occupant correspond celle pour les ressortissants de l’État occupé de se conformer à semblables mesures.’⁶

¹ In three of the cases military assistance had been given to Germany in violation of Article 52 of the Hague Regulations; in the third a policeman was charged with having enforced German racial legislation.

² In *Re Van Huis* (*Na-oorlogse Rechtspraak*, 2nd year (1946), No. 605; *supra*, p. 294) the Special Criminal Court of The Hague admitted that measures designed exclusively for the benefit of the occupied country might impose legal obligations on individuals. The distinction thus drawn between acts which benefit the local state and acts which benefit the occupant is difficult to apply in practice. It is more useful to regard the Hague Regulations as a compromise between the two interests which assures maximum satisfaction to both.

³ The most important relevant provisions are Article 43, whereby the occupant is not only empowered, but obliged, to take all steps in his power in the interest of public order and safety, and Article 52, which, by inference, authorizes requisitions in kind and in services for the necessities of the army of occupation. It should be noted, in connexion with the latter provision, that the Hague Regulations expressly provide that they are to be read in the light of customary international law—of which they are generally considered to be declaratory. While the Convention lays stress on things which the occupant is prohibited from doing, customary international law may be considered to authorize those acts which are expressly excluded from the prohibition.

⁴ It is not intended here to discuss the more general question whether international law imposes a duty on the inhabitants of occupied territory to do nothing which would jeopardize the safety of the occupant. Baxter, in this *Year Book*, 27 (1950), takes the view that it does not.

⁵ It is not proposed to discuss here the question of the duty of obedience of the civil population to the ordinary civil law which has remained in force, nor of the validity of acts entered into by reference to the normal law of the country. For a decision on the latter point see *In re Soovik; Lilles v. Public Notary*, decided by the Supreme Court of the U.S.S.R. in 1948 (*Sudebnaya Praktika Verkhovnogo Suda SSSR*, Vypusk V, 1948, pp. 3-4). It was there held that a contract concluded in German-occupied Russian territory, which was in accordance with Russian law, was valid.

⁶ *Clunet*, 47 (1920), p. 727. And see Meurer, *Die völkerrechtliche Stellung der vom Feind besetzten Gebiete* (1915), p. 17.

It has been contended that the obligation of the population to comply with the lawful orders of the occupant is derived from the law of the occupant, not from international law. In a sense that argument is true. Thus it is the occupant, not international law, who is concerned with punishment for disobedience; and incitement to disobedience by the lawful government is probably not an international delinquency.¹ But it is submitted that the fact that the occupant is permitted by international law to take certain steps and to compel obedience in relation to them gives a legal character to the resulting relationship between occupant and population—a legal character which is both derived from and delimited by international law and which, it is hoped to show below, is lacking in acts of the occupant exceeding the limits set to his power by international law. As Westlake put it:² ‘The martial law . . . consists of the regulations which by convention or approved custom are agreed on as internationally binding for the relation between invaders and invaded. . . . The law made by the occupant within his admitted power . . . will bind any member of the occupied population as against any other member of it, and will bind as between them all and their national government.’

(d) *Legal results of the acts of the belligerent occupant*

Municipal courts in occupied territory, both during and after the occupation, have generally considered that acts which the occupant is entitled to execute under the Hague Regulations produce legal results. Thus in *Re Lepore*³ the Italian Supreme Military Tribunal held, on 19 July 1946, that the seizure of public property by the occupant was permitted by Article 52 of the Hague Regulations, that it effectively vested title to the property in the occupant, and that the latter was able to transfer the title to private individuals. Similarly, the courts of several countries have held that tribunals established by the occupant in accordance with Article 43 of the Hague Regulations must be regarded as lawfully established local courts whose judgments have the authority of *res judicata*. In the *German Military Courts in Greece case*,⁴ decided by the Court of Appeal of Athens in 1945,

¹ But see Méringhac, *Traité de droit public international* (1912), pp. 41–42.

² *International Law*, vol. ii (1913), p. 99. See also Rolin, *Le Droit moderne de la guerre* (1920), p. 438.

³ *Foro Italiano*, 1947, ii, p. 133. For similar decisions see *Haw Pia v. China Banking Corporation* (*American Journal of International Law*, 43 (1949), p. 821), decided by the Supreme Court of the Republic of the Philippines on 9 April 1948; *Play v. Ruffin*, decided by a French court of first instance in 1946 (*Gazette du Palais*, 1946, ii, p. 165); and *Austrian Treasury (Postal Administration) v. Auer*, decided by the Supreme Court of Austria in 1947 (*Annual Digest*, 1947, Case No. 125).

⁴ *Ibid.*, 1943–5, Case No. 149. See also *L. v. N.*, decided by the Court of Appeal of Thrace in 1947 (*ibid.*, 1947, Case No. 110); *Endricci v. Eisenmayer* (*Foro Italiano*, 1947, i, p. 1037), decided by the Court of Appeal of Trent on 25 November 1946; *Cheang Sunny v. Ramathan Chettiar*, [1948] *Singapore Law Reports* 12, decided by the Supreme Court of Singapore Colony on 16 February 1948; *De Ahois v. De Ahois*, [1947] M.U.L.R. 141, decided by the

the Court justified this decision by reference to the view that the courts of the occupant exercised jurisdiction 'under the powers conferred by the law of war', and that 'the occupant derived judicial powers from the law of war'. Municipal courts which have functioned during the occupation have held that it is consistent with their standing and duties to enforce orders of the occupant, which the latter was, under Article 43 of the Hague Regulations, entitled to give.¹ Contracts prohibited by such legislation have been held after liberation to be devoid of legal force.² Moreover, rights acquired under legislation which the occupant was entitled to enact have been recognized to subsist after the liberation of the country.³ The reason underlying this attitude was given expression in a decision of the Court of Appeal of Crete of 1945.⁴ In that case the Court was called upon to determine the legal effects of an amnesty which had been issued by the occupant for his sole benefit. It held that an act which did not benefit the occupied territory at all produced no legal effects. But it added:

'Lorsque le fonctionnement régulier de la vie publique est impossible à assurer par l'application du droit en vigueur... l'envahisseur a le droit de légiférer en s'écartant des règles de droit en vigueur au pays occupé. Les droits acquis en vertu de telles lois... demeurent obligatoires pour le pays qui a recouvré sa souveraineté, comme ayant été acquis en conformité des règles du droit international.'

Generally, it was held by the Italian Court of Cassation in *Re Vitucci*,⁵ decided on 6 December 1945, that the occupant exercises legal powers in

Supreme Court of the Malayan Union on 5 July 1947; *Chan Kam Chuen v. Leung Ho Wai* (*Annual Digest*, 1947, Case No. 119), decided by the Supreme Court of Hong Kong in 1947; *The King v. Maung Hmin*, [1946] *Rangoon Law Reports* 1; *U San Wa v. U Ba Thin*, [1947] *ibid.* 78; *Mr. P. v. Mrs. S.* (*Annual Digest*, 1947, Case No. 118), decided by a Court of the Netherlands East Indies in 1947; *Re Krebs* (*ibid.*, 1919-42, Case No. 156), decided by the Court of Appeal of Paris in 1942; *Rhineland Occupation (Jurisdiction)* case (*ibid.*, 1919-22, Case No. 335), decided by the German Reichsgericht in 1920; a decision of the Supreme Court of Hungary of 15 May 1923 (*ibid.*, 1923-4, Case No. 243); a decision of the Supreme Court of Lithuania of 6 June 1929 (*ibid.*, 1929-30, Case No. 293); and an old United States decision: *Hellerman v. Porter* (1869), 6 Cold. 391.

¹ See, for example, a judgment of the Court of Appeal of Liège of 13 February 1917 (*Clunet*, 44 (1917), p. 1809). And see the decision of a Temporary Court Martial at Surabaya, Indonesia, of 9 January 1948, in the case of *Public Prosecutor v. X (Eastern Java)* (*Indonesisch Tijdschrift voor het Recht*, 1949, p. 69). The Court was there called upon to determine the validity of an Ordinance issued by the Commander of Allied Forces occupying Eastern Java which prohibited the possession of arms by civilians. It held that the Commander derived from the laws of war authority to enact such Ordinances, and that these were accordingly legally binding on the inhabitants.

² See, for example, *Pasicrisie Belge*, 1919, ii, p. 137; *ibid.*, 1920, ii, pp. 112, 208-9.

³ It is not quite clear whether this also applies to rights which are of continuing effect, such as the right of officials to hold office. On the question whether the acts of the occupant ever have such a continuing effect, and whether there is a distinction, in this connexion, between acts done in the interest of the occupied state and acts in the interest of the occupant, see below, p. 312, n. 2.

⁴ *Revue hellénique de droit international*, 2 (1949), p. 302. See, to the same effect, *Aboitis & Co. v. Price* (99 F. Supp. 602), decided by the United States District Court for Utah on 16 June 1951; and an old United States decision, *Thorington v. Smith*, 8 Wall. 11.

⁵ *Foro Italiano*, 69 (1944-6), ii, p. 81. The Court held that military police officers of the occupant were, accordingly, public officials in the meaning of Article 357 of the Italian Penal Code which makes bribery of public officials a criminal offence.

respect of matters which he is by international law authorized to regulate. That was also the view of the Dutch Court of Cassation in the case of *Zeeuwsche Hypotheek-Bank Ltd. v. State of the Netherlands*,¹ decided on 30 January 1948. In that case the question before the Court was whether a contract concluded by administrative officials during the occupation was binding on the State of the Netherlands. The Court held that whatever the occupant did within the limits of the task allotted to him was, by international law, binding upon the occupied state.

(e) *Measures taken by the returning sovereign*

Moreover, while the returning sovereign is free to rescind retroactively all acts of the occupant—for it cannot be denied that the sovereign has full legislative freedom in the matter—it has been held that the returning sovereign must not abrogate at will legislation which the occupant was, by the Hague Regulations, entitled to enact. This is an implicit recognition of the legal value of such acts.² While there is little authority in the practice of states as to this point,³ there is remarkable agreement amongst authors.⁴ Even Oppenheim, who stressed the ‘factual’ nature of the relationship between the occupant and the inhabitants of territory subjected to his sway, held that, seeing that acts which the occupant is, according to international law, competent to perform are legitimate acts of warfare, the former occupant has a right, by international law, to demand the recognition of such acts by the returning sovereign.⁵ Professor Hyde, without going so far as to assert that there is an international obligation in the matter, suggests that the doctrine that the territorial sovereign is under no obligation to be bound by what the occupant enacted ‘is a dangerous doctrine which, if

¹ *Nederlandse Jurisprudentie*, 1948, No. 108. And see, to a similar effect, *Chop Sun Cheong Loong v. Lian Teck Trading Co.*, [1947] *Malayan Union Law Reports* 80, decided by the Supreme Court of the Malayan Union on 19 April 1947.

² If the acts of the occupant have no legal character, even his legitimate acts are void in relation to the returning sovereign. This is the conclusion drawn by a French Ordinance of 9 August 1944 (*Sirey*, 1944, *Lois*, p. 1585), which provides: ‘les lois . . . que l’autorité de fait qui s’est imposée à la France [i.e. the *de facto* French Government established during the occupation] a promulguées . . . ne peuvent tirer de sa volonté aucune force obligatoire. . . .’

³ The view here put forward was relied upon by the defendant in *Hongkong and Shanghai Banking Corporation v. Luis Perez-Samanillo Inc. and Register of Deeds of Manila* (*Annual Digest*, 1946, Case No. 157), but was held to be inapplicable because the act of the occupant, namely, the enactment of currency legislation, had been illegal. The French Decree of 9 August 1944 cited above, n. 2, is probably not relevant in this connexion. It deals, in the main, with the legislation of the so-called French Government which functioned in France during the occupation. Without a close study of its relations with the occupant it is impossible to say how far the acts of such a government should be regarded as acts of the occupant. In the case of France, the *de facto* Government would appear to have possessed a considerable degree of independence.

⁴ See, however, Professor Fernand de Visscher’s note in *Annual Digest*, 1927–8, at p. 559. Professor Visscher strongly supported the ‘factual’ theory of belligerent occupation.

⁵ *International Law*, vol. ii (2nd ed., 1912), p. 342. This passage, which has been left virtually unchanged by subsequent editors, is cited with approval by Sauser-Hall in *Annuaire suisse de droit international*, 1 (1944), p. 106.

consistently and broadly applied, must be defiant of legal principle', and that 'lawful acts or transactions by the occupant, such as were in harmony with the requirements of the Hague Regulations of 1907, should be respected for the benefit of all concerned'.¹ Sir Arnold McNair states that 'it is customary' for the legitimate government to recognize measures of the occupant taken within the scope of his authority.² Amongst French writers Pillet asserted that 'les lois et règlements portés par l'occupant pendant la période de l'occupation, les actes passés par le ministère de ses fonctionnaires, les jugements émanés des juridictions par lui instituées devront être considérés comme bons et valables par le gouvernement légal, lorsqu'il aura récupéré les provinces dont l'occupation ennemie lui avait ôté l'administration'.³ Rolin⁴ expressed his adherence to Westlake's view that 'les effets que [la loi édictée par l'occupant] a déjà produit subsistent lorsque l'occupation a cessé sans qu'on puisse obtenir l'annulation des actes d'exécution déjà accomplis'. Mérignhac,⁵ like Oppenheim, affirmed the existence of an international obligation in the matter.

Like the decisions of municipal courts which have been cited in connexion with the legal position of the inhabitants of occupied territory, these statements serve to demonstrate the existence of a general acceptance of the legal character of acts of the occupant which fall within the limits of the powers permitted to him by international law. It may, indeed, be argued that the view of writers in the matter has been actuated mainly by the fact that it is inexpedient to annul changes in private relationships which have resulted from acts of the occupant. But the argument based on expediency has not prevailed in relation to acts of the occupant which are not authorized by international law, although, after the rule of an unscrupulous occupant, considerable changes, which cannot easily be undone, may have resulted from them. It would therefore seem that it is recognized that the legitimate acts of the occupant produce legal effects the retroactive annulment of which would, in accordance with general notions, be contrary to legal principle.

On this view of belligerent occupation the question whether the inhabitants of occupied territory are bound by their municipal law not to co-operate with the enemy or are justified in complying with his lawful

¹ *International Law, chiefly as interpreted and applied by the United States* (2nd rev. ed., 1945), para. 690.

² *Legal Effects of War* (3rd ed., 1948), p. 322. See also Hall, *International Law* (8th ed. by Pearce Higgins, 1924), p. 579.

³ *Les Lois actuelles de la guerre* (2nd ed., 1898), pp. 255-6.

⁴ *Le Droit moderne de la guerre* (1920), i, p. 438.

⁵ *Traité de droit public international* (1912), iii, p. 410. It may be that some writers have stressed the existence of an international obligation in the matter because, while recognizing the legal character of the acts of the occupant, they have been reluctant to admit that international law can determine the nature of relations with private individuals.

orders¹ may be regarded as a question of the relationship of international law and municipal law.² In the matter of the requisitioning of services under Article 52 of the Hague Regulations, with which the cases cited at the beginning of this section were concerned, the individual is faced with an order of the occupant which is given legal force by the fact that international law permits the occupant to issue it, and with a provision of his own municipal law prohibiting compliance with that order. The conflict of duties, as presented by this case, is unusual in that there is, on the face of it, a conflict between two systems of municipal law: that of the occupied territory, and that of the occupant whose intervention is authorized by international law. But there is no reason why the principles which apply to a simple conflict between international law and municipal law should not apply here. Moreover, this would seem to be a case in which municipal courts should have no difficulty in so interpreting their municipal³ law as not to bring about a conflict of duties. The rules governing belligerent occupation should, it is submitted, be regarded as a *lex specialis*, which forms an exception to the more general rule of municipal law prohibiting assistance to the enemy.

II. *The municipal effects of unlawful acts of the occupant*

The question of the effect of acts of the occupant which are prohibited by the Hague Regulations is also closely connected with the legal nature of the régime of belligerent occupation. If occupation is regarded merely as a factual exercise of power, the question of the effect of violations of the Hague Regulations has no special significance. For in such a case the initial validity in the municipal sphere of acts of the occupant which violate these rules is tested in the light of their effectiveness, not of their compliance

¹ The orders must, of course, be lawful in the sense of having been permitted by the Hague Regulations. Thus Belgian courts have held, rightly it would seem, that Belgian administrative officials who carried on their functions during the German occupation were not justified in executing unlawful orders of the enemy, even if they did so in the hope of obtaining concessions for the benefit of the population. See *Schuind v. Belgian State*, decided by the Court of Cassation on 2 March 1948 (*Pasicrisie Belge*, 1948, i, p. 137), and *Schillings v. Administration des Finances*, decided by the same Court on 13 April 1948 (*ibid.*, p. 254).

² See, for example, *Public Prosecutor v. Lian* (*Annual Digest*, 1943-5, Case No. 155), decided by the Supreme Court of Norway on 14 November 1945. In that case the Court found that a Norwegian decree prohibiting the acquisition by Norwegian citizens of property confiscated by the occupant was not inconsistent with the right of the occupant to carry out the confiscation. But it assumed, significantly, that there would have been a conflict between international law and municipal law had such an inconsistency been established. It held, *obiter*, that Norwegian citizens were bound by municipal law even where it conflicted with international law. See also *Rotterdamsche Bank Ltd. v. Nederlandsch Beheers Instituut* (*Nederlandse jurisprudentie*, 1949, No. 566), decided by the Court of Appeal of The Hague on 15 December 1948. It was there held that a Dutch Decree prohibiting intercourse with the enemy was not inconsistent with the powers given to the occupant by Article 43 of the Hague Regulations, and that the appellant was, accordingly, bound not to contract with enemy subjects.

³ The two cases cited above (n. 2) show a tendency to interpret international law in such a manner that it does not conflict with municipal law.

with legal rules of superior authority. Moreover, in relation to the returning sovereign, the acts of the occupant have no legal character and he is free to rescind even such acts as were in accordance with the Hague Regulations. The sanction for breaches of the Hague Regulations, on such a view of belligerent occupation, is the same as that which is normally the result of acts in the municipal sphere which are contrary to an international treaty, namely, the payment of damages to the signatory injured by the violation. It may be noted, in this connexion, that Article 3 of the Fourth Hague Convention provides that 'a belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to make compensation'.¹ On the other hand, if belligerent occupation is regarded as a legal régime wholly governed by international law, there is room for the view that the competence of the occupant is limited by the provisions of the Hague Regulations, and that acts which are not permitted by those Regulations are, in consequence, null and void. It has been shown elsewhere that international courts are, as a rule, reluctant to regard as void municipal acts which are contrary to international law even when international law appears to limit the competence of the municipal organ concerned.² This, it was suggested, takes account of the imperfections of international organization. But in the case of belligerent occupation the fact that the lawful government often recovers the territory and is able to give effect to the dictates of international law, and that its courts frequently continue to function during the occupation, reduces the importance of this practical obstacle. Accordingly, the operation of the principle that the acts of incompetent organs cannot be considered to have legal validity ought not to be affected by it. Such acts should be treated as a legal nullity both by the courts of the occupied country during the occupation—where they have the power to do so—and by the returning sovereign.

¹ It may be argued, however, that there will be a need for compensation even if certain acts of the occupant are regarded as a legal nullity, seeing that they may have done practical damage. Moreover, it is of some interest to inquire into the purpose of Article 3—the duty to pay compensation for the breach of a legal rule is usually assumed. It would seem that at the time of the Second Hague Conference there were doubts whether the Hague Regulations, which were embodied only in an Annex to a Convention, had the force of law. These doubts Article 3 was designed to dispel. See Pearce Higgins, *The Hague Peace Conferences* (1909), p. 260.

² See this *Year Book*, 27 (1950), p. 43. The main example of that attitude is to be found in the Opinion of the Permanent Court of International Justice on the *Interpretation of the Memel Statute* (*Publications of the P.C.I.J.*, Series A/B, No. 49, p. 336). It was there held that an order which the Governor of the territory under international law lacked competence to make could nevertheless have legal effects in the municipal sphere. The Court said: 'The Court thinks it well to add that its function in the present case is limited to that of interpreting the Memel Statute in its treaty aspect. It has arrived at the conclusion that on the proper construction of the Statute the Governor ought not to have taken certain action which he did take. It does not thereby intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect in the sphere of municipal law. This is tantamount to saying that the dissolution is not to be regarded as void in the sense that the old Chamber is still in existence.'

(a) *Review of unlawful acts of the occupant by municipal courts*

The attitude of courts of the occupied country to acts of the occupant which are contrary to the provisions of the Hague Regulations, while not altogether uniform, has shown a tendency to support that view. It is convenient to distinguish, in this connexion, between decisions given during the period of the occupation and judgments rendered after the liberation of the territory. For the courts clearly possess much greater freedom after the termination of the occupation.

(i) *Decisions of municipal courts during the occupation.* Dutch courts¹ during the Second World War declined to review legislative acts of the German occupant in the light of Article 43 of the Hague Regulations.² They did so for two reasons. In the first instance, they adopted the view that the orders of the enemy had the same authority as acts of the Dutch legislature whose conformity with the Constitution or international law Dutch courts were not, according to Article 124 of the Constitution, competent to review. Secondly, they held that

'neither the history nor the wording of Article 43 of the Regulations of 1907 afford any foundation for the assumption that the framers of the Convention intended to confer on the Courts which had remained in function in an occupied territory in conformity with the purport of that Article, jurisdiction to judge the measures taken by the occupant for the promotion of the interest therein set forth, in the light of the requirement that, in doing so, the occupying Power is bound to respect the legislation in force in the country, except when absolutely prevented'.

The first of these reasons is plainly untenable. It is generally agreed at the present day that, whatever the position of the belligerent occupant may be, he does not exercise sovereignty over occupied territory; neither does he represent the lawful sovereign.³ It cannot therefore be said that his enactments have the same legal force as those of the sovereign legislature of the

¹ See *Annual Digest*, Supplementary Volume, 1919-42, Case No. 161 and Note. The Netherlands Government, on the liberation of Dutch territory, showed its disapproval of that attitude by suspending the members of the Supreme Court. And see the view of the Dutch Special Court of Cassation in *Re Contractors Knols*, decided on 2 December 1946 (*supra*, p. 293), to the effect that the Hague Convention could 'involve, for the Courts, the task of deciding the validity of rules laid down by the occupant by reference to their compatibility with the annexed Regulations'.

² See also *Annual Digest*, Supplementary Volume, 1919-42, Case No. 157, for a sweeping statement by a French Court of first instance to the effect that 'the decrees of the occupying authorities bind all within the occupied territories'. The Court in that case, decided in 1941, categorically declined to review the legality of racial legislation enacted by the German occupant. The French Conseil d'État also appears to have considered itself incompetent to review the legality of acts of the occupant. See, for example, the decision reported in *Annual Digest*, 1943-5, Case No. 161 and Note. This may, however, have been due to the strictly limited jurisdiction of that Court.

³ Article 68, para. 3, of the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War, for instance, provides as follows: 'The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that, since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.' (Cmd. 8033, Misc. No. 4 (1950), p. 116.)

country, which are specially protected by the Constitution.¹ The second argument may be more acceptable, provided that emphasis is laid on the phrase 'measures taken for the promotion of the interest therein set forth'—a matter which will be discussed below. In any case, however, the Dutch courts under German occupation seem to stand virtually alone in their general refusal to review acts of the occupant in the light of the principles of international law. The Norwegian Supreme Court, in a letter addressed to the Ministry of Justice in 1941, asserted its competence to determine the validity of decrees issued by the occupant in the light of international law.² Similarly, a Norwegian District Court held in the *Overland case*, decided on 25 August 1943, that a decree of the occupant which set aside the allodial laws of Norway could not be enforced. The Court said that, while it was unnecessary for it to decide whether municipal courts are in all cases competent to scrutinize the validity of the acts of the occupant from the point of view of their conformity with international law, 'it must be assumed that the courts will in all circumstances be obliged to refuse to base their decisions on legislation which is obviously in contradiction to Article 43 of the Hague Regulations'.³ The Greek Court of Cassation, in its Judgment No. 255 of 1944,⁴ held that the judgment of a military court of the occupant which was contrary to Article 43 of the Hague Regulations in that it did not respect the laws in force in the country, 'must be treated by Greek courts as null and of no effect'. It accordingly allowed an appeal from that decision. Similarly, Belgian courts in German-occupied territory held, during the First World War, that they could only apply orders of the occupant which 'rentrent dans la mission exceptionnellement reconnue à l'occupant par la Convention de la Haye et son annexe',⁵ and that, where the decrees of the occupant were issued in violation of a prohibition of that Convention, 'le pouvoir judiciaire devrait nécessairement refuser l'application de ces décrets pris en violation de la Convention de la Haye'.⁶ The German Reichsgericht decided, on 19 April 1921, that

¹ This was affirmed in a decision of the German Reichsgericht of 2 April 1923 (*Annual Digest*, 1923-4, Case No. 238). It was there held that Article 134 of the Civil Code, which avoids contracts offending against *statutory* provisions, did not apply to contracts made in breach of an order enacted by the United States army of occupation.

² *Ibid.*, 1919-42, Case No. 160, Note. The Supreme Court subsequently resigned and was replaced by a new Court. That Court appeared to be more subservient to the occupant. However, its leading decision, of 10 February 1941, on the question whether the acts of the occupant are subject to review, which will be discussed at length below, at p. 307, did not completely abandon the principle established by its predecessor. For the Court there expressed the view that it might be able to annul, on the ground of its illegality by international law, a legislative measure of the occupant which plainly transgressed the bounds of the discretionary authority conferred on the occupant by Article 43 of the Hague Regulations. (See *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 11 (1942-3), at p. 604.)

³ *Annual Digest*, 1943-5, Case No. 156.

⁴ *Ibid.*, Case No. 150.

⁵ See a decision of the Court of Cassation of 14 June 1917, cited in *Law Quarterly Review*, 34 (1918), p. 81. And see the decision of the same Court of 20 May 1916 (*supra*, p. 292).

⁶ See a decision of the Court of Appeal of Liège of 13 February 1917 (*Clunet*, 44 (1917),

legislation by the United States occupation authorities which did not fall within the scope of Article 43 of the Hague Regulations could have no effect on the legal relations of private persons.¹ Finally, we may mention in this connexion a provision of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. After having, in Articles 64 and 66, given a belligerent occupant the power to enact certain penal provisions and to try the inhabitants of occupied territory for a breach of such provisions in its military courts, the Convention provides, in Article 67, that

'the courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. . . .'²

That provision is significant in that it clearly demonstrates the intention of the parties that the municipal courts in an occupied country—and, moreover, the occupant's own courts—shall protect certain rights of the inhabitants which are guaranteed to them by that Convention, and shall treat as unenforceable laws of the occupant which violate these rights.

(ii) *Decisions of municipal courts after the liberation of occupied territory.* The predominant tendency of municipal courts even during the occupation has thus been to consider the legal competence of the occupant to be restricted within the limits set to his powers by the Hague Regulations. This view has been expressed, even more emphatically, by courts after the liberation of the territory. This must not be confused with the power of the returning sovereign to rescind the acts of the occupant, on occasions with retroactive effect—a subject which will be examined below. There is not, in the cases to be surveyed in this section, any reliance, on the part of courts, on the legislative intervention of the lawful sovereign, which alone could produce such a result. Nor are these cases concerned with the effects of the legislation of the enemy after liberation; this, again, is a different matter.³ They represent the view of courts on the question of the legal validity of wrongful acts of the occupant during the period of the occupation. In France, after the First World War, the Court of Appeal of Douai held, on 15 May 1919, that a judgment of a court set up by the German occupant in violation of Article 43 of the Hague Regulations could not be recognized: 'en constituant cette juridiction, l'autorité allemande a outrepassé les droits que lui conférait, le cas échéant, l'article 43 de la Convention de la Haye

p. 1809). In that case, as also in the two decisions cited above, p. 303, n. 5, it was held that special tribunals with jurisdiction over disputes relating to leases had been lawfully established by the Occupant.

¹ *Annual Digest*, 1919-22, Case No. 305.

² Cmd. 8033, Misc. No. 4 (1950), p. 115.

³ See below, p. 312, n. 2.

... Les circonstances seules de sa création rendent ce tribunal inexistant'.¹ In Greece, the Criminal Court of Heraklion stressed, *obiter*, in two decisions given in 1945, that private rights arising from the legislation of the occupant are valid only if that legislation was enacted in the interest of public order and safety and thus fell within the limits of the powers conferred upon the occupant by international law.² Both French and Italian courts have held, in a number of instances, that acts of requisition by the occupant in circumstances not permitted by international law cannot produce legal effects. Thus they cannot serve as a defence to a bank sued by a depositary whose deposit was so seized;³ nor do they pass title where the occupant later purports to transfer the property to a private purchaser.⁴ Belgian courts, after the First World War, rendered a number of similar decision.⁵ So did Polish⁶ and Estonian⁷ courts.

(b) *Limits on the competence of municipal courts to review unlawful acts of the occupant*

If any general principle emerges from the practice of municipal courts

¹ *Clunet*, 46 (1919), p. 770. See also *ibid.* 47 (1920), p. 213. With reference to similar facts the Belgian-German Mixed Arbitral Tribunal held, in the case of *Ville d'Anvers v. Etat allemand*, decided on 19 October 1925 (*Recueil des Décisions des Tribunaux Arbitraux Mixtes*, 5 (1926), p. 712, at p. 718) that 'l'institution de ce tribunal ayant été contraire à la Convention de la Haye, ses décisions doivent être tenues pour nulles et non avenues'. A similar decision was also given by the Supreme Court of Hungary in the case of *András*, decided on 14 September 1932 (*Annual Digest*, 1931-2, Case No. 232).

² *Ibid.*, 1943-5, Cases No. 151 and 162. See also *V. v. O.*, decided by a Court of first instance of Corfu (*ibid.*, 1947, Case No. 121). And see, to a similar effect, *Ko Maung Tin v. U Gon Man*, decided by the High Court of Burma on 3 May 1947 (*ibid.*, Case No. 104). See also *Aboitiz & Co. v. Price* (99 F. Supp. 602), decided by the District Court for Utah on 16 June 1951.

³ *Weber v. Credito Italiano*, decided by a Court of first instance of Florence on 30 July 1945 (*Foro Italiano*, 69 (1944-6), i, p. 639).

⁴ *Lucchesi v. Malfatti*, decided by a Court of first instance of Florence on 10 December 1945 (*ibid.*, p. 985); *Mazzoni v. Ministry of Finance*, decided by the Court of Venice on 8 January 1927 (*Annual Digest*, 1927-8, Case No. 384); *Secret v. Loizel* (*ibid.*, 1943-5, Case No. 164). See also the decision of a Philippine Court in *Hongkong and Shanghai Banking Corporation v. Luis Perez-Samanillo Inc. and Register of Deeds of Manila* (*ibid.*, 1946, Case No. 157).

⁵ See, for example, *Commune of Grace Berleur v. Colliery of Gosson Lagasse* (*ibid.*, 1919-22, Case No. 326), decided by the Belgian Court of Cassation on 29 July 1919. In that case the Court upheld the validity of a Belgian tax law which did not comply in form with requirements laid down by the German occupant on the ground that the occupant was not entitled to enact provisions relating to the formalities of legislation. See also *De Brabant and Gosselin v. Florent* (*ibid.*, Case No. 328), decided by the Court of Appeal of Brussels on 22 July 1920. In that case the binding force of an order prohibiting the sale of vegetables was denied on the ground that it went beyond the powers given to the occupant by Article 43 of the Hague Regulations. And see decisions of Belgian courts denying legal effects to judgments of illegally constituted courts set up by the occupant, and acts of unlawfully appointed officials: *Pasicrisie Belge*, 1920, iii, p. 50; *ibid.*, 1919, ii, p. 44; *ibid.* iii, pp. 177 and 183; *Clunet*, 47 (1920), p. 1038.

⁶ See, for example, *Siuta v. Guzkowski* (*Annual Digest*, 1919-22, Case No. 342), decided by the Polish Supreme Court on 15 February 1921, where it was held that the occupant could not transfer legal title to property which had been requisitioned for the sole purpose of sale.

⁷ See, for example, *City of Pärnu v. Pärnu Loan Society* (*ibid.*, 1935-7, Case No. 231), decided on 28 February 1921 by the Estonian Court of Cassation. The Court held that a lease of municipal land granted by the occupant was null and void, on the ground that Article 46 of the Hague Regulations prohibits the alienation of private property.

of many countries, it is that acts of the occupant which are unlawful by international law are considered to have been executed by an incompetent organ and to lack legal force. In its practical application, however, certain limitations on that principle must be noted. In the first instance, too sweeping an interpretation must not be given to the phrase 'unlawful acts of the occupant'. While municipal courts during the occupation have affirmed that they will not enforce measures of the occupant which go beyond the powers permitted him by international law, they have been reluctant to inquire whether legislative measures which *prima facie* could be intended to safeguard public order, and thus to satisfy the requirements of Article 43 of the Hague Regulations, were in fact necessary. They have considered themselves bound to apply them. The distinction between legislation which is clearly outside the competence of the occupant and measures which fall within the scope of his powers was drawn particularly clearly in a decision of the Court of Appeal of Liège of 13 February 1917. The Court was called upon to determine the validity of the establishment, by the occupant, of tribunals with sole jurisdiction over disputes relating to leases. Having held that, were the occupant to change, for instance, the law of succession, the courts would be bound to refuse to enforce his laws, it found that the law invoked before it, which related to economic matters,

'rentre dans le cadre de celles où . . . le pouvoir occupant peut apporter des modifications à la législation nationale'.

It continued:

'Il est vrai que, même en ces matières, l'intervention de l'occupant n'est légitime que s'il y a empêchement absolu de dénouer la crise au moyen de la législation en vigueur. Il n'appartient pas au pouvoir judiciaire de vérifier si cette condition existe, celui auquel incombe le maintien de l'ordre et de la vie publique étant, comme il ressort d'ailleurs des travaux préparatoires, seul juge de la nécessité, de l'opportunité et de l'efficacité des moyens auxquels il convient de recourir pour remplir, dans les limites tracées par la Convention de la Haye, la mission que l'article 43 lui impose. Sans doute, administrant le pays occupé sous la sanction déterminée par l'article 3 de la Convention, l'occupant ne peut modifier ou suspendre arbitrairement les lois qui y sont en vigueur, mais lorsqu'il agit dans la sphère où son droit de légiférer a été circonscrit, l'usage qu'il en fait échappe au contrôle des cours et tribunaux.'¹

The Belgian Court of Cassation likewise appears to have given this doctrine its support.² A Norwegian District Court, in the *Overland case*, was careful to make it clear that, while prepared to refuse enforcement to 'legislation

¹ *Clunet*, 44 (1917), p. 1809.

² This would seem to be the explanation of the passage in its decision in the case of *De Ridder-Tartarin v. Procureur du Roi* of 20 May 1916 (*Clunet*, 47 (1920), p. 727, *supra*, p. 292), to the effect that 'les difficultés relatives à la manière dont l'occupant s'est acquitté de sa mission concernent les rapports entre nations; leur solution ne peut conduire qu'à l'application de la sanction prévue par l'article 3 de la Convention.'

which is obviously in contradiction to Article 43 of the Hague Regulations', it was not deciding that municipal courts are in all circumstances competent to scrutinize the validity of acts of the occupant.¹ Similarly, the Norwegian Supreme Court held, in the case of *Halvorsen*, decided on 10 February 1941, in relation to the question whether certain regulations for the control of prices were subject to review:

'In approaching the question whether an Ordinance is in conformity with Article 43 of the Hague Regulations, we must note, first, that the occupant is empowered to enact new laws where the necessity arises. Whether such legislation is, in fact, urgently necessary is a question of policial expediency which must be left to the judgment of the occupant who exercises legislative power in occupied territory. It cannot be subjected to judicial review. If courts had the right to examine the expediency of a law or to deny the necessity for its enactment, they would be liable to interfere in a field for which they lack the required qualifications, and in which the occupant must have the decisive voice, seeing that he is by international law both entitled and bound to ensure public order and public life in occupied territory.'²

Moreover, this line of reasoning would serve to explain the second contention of the Dutch Supreme Court, cited above, in refusing to review the validity of measures taken by the occupant for 'the promotion of the interest set forth in Article 43 [of the Hague Regulations]'.³

Municipal courts during the occupation are, clearly, ill equipped to determine the necessity for a particular enactment of the occupant, and their attitude in the matter provides no basis for the formulation of a general rule. But the phrasing of Article 43 of the Hague Regulations shows that the occupant is invested with a certain discretion—as any administering power must be. It is consonant with justice and legal principle to suggest that his decision on administrative matters cannot be reviewed on its merits, and to require that claims alleging an abuse of his discretion be established to the satisfaction of an impartial tribunal.⁴

¹ *Supra*, p. 303.

² *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 11 (1942-3), at p. 604. The Court at the time was composed of judges appointed by the occupant, and was anxious to uphold his decrees. It is the more significant that it based its decision on the ground that courts cannot review the validity of enactments which fall *prima facie* within the limits of the powers of the occupant—for which it found ample precedent in the practice of states and the writings of publicists—and did not declare, in more general terms, its lack of competence to annul legislative enactments of the occupant.

³ See above, p. 302. See also a decision of the German Reichsgericht of 25 October 1920 (*Fontes Juris Gentium*, Series A, Section II, vol. i, No. 205) where it was held, with regard to the question whether the Allied authorities of occupation were able to suspend the operation of German exchange control regulations, that the courts of the occupied country were unable to appreciate whether the occupant had exceeded the powers conferred on him by Article 43 of the Hague Regulations by repealing the local law in circumstances where there was no imperative necessity for such a step.

⁴ It would seem to be generally accepted that where a discretion is committed to an administrator, his decision cannot be reviewed on the merits (see, for example, Wade and Phillips, *Constitutional Law* (4th ed., 1950), p. 289). Practice also suggests that irrelevant motives, as opposed to an improper purpose, will not cause courts to interfere on the ground of abuse of discretion (*ibid.*).

Moreover, there may be grounds for suggesting¹ that the sanction for an abuse of discretion should be an indemnity, not the declaration that measures on the faith of which relationships have been established are null and void.² Some support to this view is given by the analogous decision of the Anglo-German Mixed Arbitral Tribunal in the case of *Tesdorpf v. German State*.³ In that case the plaintiff claimed that a requisition of coffee, which would have been lawful had the coffee been employed for the needs of the army of occupation, was null and void on the ground that part of the coffee was subsequently removed to Germany. In a passage which has been construed to mean that the Court supported the view that the unlawful acts of an occupant are valid, but give rise to a right to damages, the Tribunal said:

'The Tribunal have further to consider whether the seizure at Antwerp is to be declared void by virtue of international law. They do not take this view. There has undoubtedly been a certain misuse of the right of requisition in the seizure and use of the bags of coffee for the needs, not of the army occupying Belgium, but for other parts of the Germany army, for which purpose the coffee was removed to Germany. But the fact that the limits contemplated by Article 52 of the Hague Regulations were in the present case exceeded, cannot automatically⁴ lead to the consequence that the requisition is without legal effect. Such a sanction is not to be found in the Fourth Hague Convention which, on the contrary, provides in Article 3 that the Power the armies of which are transgressing rules in the Regulations is liable to indemnify.'

The true meaning of that passage was explained by the same Tribunal in the later case of *Ralli Bros. v. German Government*.⁵ Referring to the *Tesdorpf* case, it stressed that in that case 'the Tribunal had found that the requisition of coffee for the needs of the army was allowed by Rule 52 of the Hague Regulations, and that, if part of the coffee had unduly been allocated to other troops than those of the occupation, such a misuse could not justify the denial of the right of requisition as such as allowed by Rule 52'.

¹ In England there has been a tendency to regard an abuse of a statutory discretion as an *ultra vires* act which is void *ab initio* (*Roberts v. Hopwood*, [1925] A.C. 176; Wade and Phillips, op. cit., p. 289). But it would seem that the doctrine of English courts—influenced, perhaps, by deference to the sovereignty of Parliament—that an act is either authorized by Parliament or falls outside the statutory power, is not the only possible judicial construction. On the contrary, it may be argued that the abuse of a discretionary power is an illegality of quite a different nature from action taken without any legal authority whatsoever, and one which does not necessarily give rise to the same legal consequences.

² This leaves out of account the undoubted power of the returning sovereign to abrogate such measures of the occupant. We are here dealing with the automatic consequences of illegality.

³ *Recueil des décisions des tribunaux arbitraux mixtes*, 3 (1924), p. 22, at p. 27.

⁴ Attention may be drawn to the fact that in the *Tesdorpf* case itself the Tribunal added: 'The Tribunal are not of opinion that in the absence of an express provision avoiding wrongful acts such sanction is to be excluded altogether. This is a point which must be decided according to the general rules and spirit of international law, and having regard to the special circumstances of each case. . . .' And see Rolin, *Le Droit moderne de la guerre*, vol. i (1920), pp. 445–6.

⁵ *Recueil des décisions des tribunaux arbitraux mixtes*, 4 (1925), p. 41.

It should be noted that courts, both international and municipal, retain a considerable power of declaring acts of the occupant to be devoid of legal effect. For it is for them to decide whether the acts of the occupant were *prima facie* within the scope of Articles 43 or 52 of the Hague Regulations, or whether they were clearly outside the competence of the occupant. But it would seem that the distinction is both useful and in accord with legal principle.

The second limitation on the general principle of the nullity of unlawful acts of the occupant does not bear on the principle itself, but rather on its effects. It concerns, in particular, the transfer, by the occupant, of property seized outside the scope of Articles 49 and 52 of the Hague Regulations.¹ The nullity of the seizure and the transfer does not, of itself, entitle the original owner to restitution against the last possessor. The person into whose possession the property has come may, by common law, have acquired a valid legal title thereto, as, for instance, in the case of a bona fide purchaser for value in market overt. This difficulty can be resolved by special legislation, by the returning sovereign or by third states, declaring all subsequent transactions void. Many such enactments have, in fact, recently been passed.² Again, the property may no longer be in existence, and the question arises whether the original owner is entitled to damages against a private person who can be shown to have possessed, and to have consumed or destroyed, the property.³ In the absence of express legislation this question, also, must be decided by reference to the local rules relating to the law of tort; the right to damages is by no means automatic. The same applies to the question whether the rightful owner is entitled to damages for being deprived of the use of his property.⁴ In fact, while we may refer to international law for guidance on the question whether an act of the occupant was legally valid, municipal law alone can determine the consequences of invalidity.⁵

¹ Private property seized under Article 53 of the Hague Regulations must be restored at the peace; the occupant accordingly in no case acquires a power of disposal.

² See, for example, the Belgian Decree-Law of 10 January 1941; the French Ordinance of 21 April 1945, Article 4; and the Swiss Bundesratsbeschluss of 10 December 1945. And see para. 2 of Article 75 of the Treaty of Peace with Italy of 10 February 1947, and similar provisions of other Peace Treaties of that date.

³ The original owner retains, in all circumstances, the right to claim a share of reparations paid by the enemy state. This remedy may, however, be inadequate.

⁴ For an instance of the solution of this problem see *Ledieu, Veuve Vandedaële v. Bothilda (Pasicrisie Belge)*, 1946, iii, p. 5), decided by a Belgian Court of first instance on 6 September 1945. It was there held that the purchaser of a lorry which had been unlawfully seized by the occupant was not liable to pay damages for divesting the lawful owner of the property as from the date of purchase, seeing that the owner was in fact deprived of the use of the property by the act of the occupant alone. Defendant was, however, ordered to pay damages for the detention of the lorry from the date of the issue of the writ by the former owner, on the ground that his failure to surrender the property at that time became the sole cause of the plaintiff's inability to use it.

⁵ This is so partly because international law lacks detailed rules governing the matter. However,

(c) *Annulment of unlawful acts of the occupant by the returning sovereign*

The main purpose of legislative enactments by the returning sovereign concerning the legal effects of unlawful acts of the occupant has been to determine the rights of third parties and the methods of redress, and thus to obviate the difficulties adverted to above. The language of courts, in applying such enactments, occasionally demonstrates this. Thus in *Delville v. Servais*,¹ decided by the Court of Appeal of Liège on 19 October 1945, the Court first concluded independently that the act of the occupant in transferring to the defendant property which had been unlawfully requisitioned was 'without effect in law'. It then proceeded to apply the provisions of the Belgian Law of 10 January 1941 concerning the rights of third parties, and held that the defendant must restore the property to its former owner and that he was not entitled to reimbursement. But in many cases the returning sovereign has expressly provided for the retroactive annulment of unlawful acts of the occupant.² Peace treaties have contained provisions which are similar in effect.³ This has given the impression that the nullity even of illegal acts of the occupant results from the intervention of the lawful sovereign. Several points should, however, be noted in this connexion.

In the first instance, the phraseology of legislative provisions which retroactively annul unlawful acts of the occupant occasionally leaves room for the interpretation that such acts were void even without the intervention of the legislature. That point may be illustrated notably by reference to the Belgian Decree-Law of 10 January 1941. That Law provided that the acts of dispossession committed by the occupant would be 'abrogés de plein droit au fur et à mesure de la libération'. Superficially that phraseology implies that the acts of the occupant, even if illegal, are considered, in the absence of any legislation of the lawful sovereign to the contrary, to have had a limited validity. In at least one case—*Thiriez v. Descamps*,⁴ decided

essentially the legal relationships involved are subject to the rules of the national legal system in which they are formed. Unlike the acts of the occupant himself, they are not subject to international law because they are of no direct international concern.

¹ *Annual Digest*, 1943-5, Case No. 157.

² See, for example, the French Ordinances of 12 November 1943, 9 August 1944, and 21 April 1945; the Dutch Decree on Occupation Measures of 17 September 1944; the Belgian Decree-Law of 10 January 1941; the Polish Decree of 2 December 1939 (which referred expressly to the Hague Regulations); the Luxembourg Decree of 22 April 1941; the Yugoslav Decree of 28 May 1942; the Greek Decree of 22 October 1941; and the Norwegian Decree of 18 December 1942. For details of these instruments see *American Journal of International Law*, 39 (1945), pp. 222 ff. Some of them also annul acts which may have been legal under international law.

³ See Treaty of Peace of 10 February 1947 with Italy, Article 75; with Bulgaria, Articles 22 and 26; with Hungary, Articles 24 and 30; with Finland, Articles 24 and 28; with Roumania, Articles 23 and 28; Treaty of Versailles of 28 June 1919, para. 1 of Annex to Article 297.

⁴ *Pasicrisie Belge*, 1949, iii, p. 19. In that case the property in dispute was seized by the enemy on French territory, and subsequently claimed by the original owner from a Belgian purchaser. The action failed on various grounds, but on the point here at issue the Court held that 'the Belgian Government did not intend to take the place of governments similarly overrun by Ger-

on 14 July 1948—a court of first instance appears to have taken that view. But there has been an impressive jurisprudence of the Court of Cassation to the effect that 'l'abrogation est décrétée sans préjudice de la nullité qui vicierait ces mesures'.¹ Moreover, in *Bindels v. Administration des Finances* the Court of Cassation arrived at that conclusion after a careful examination of the preparatory work preceding the enactment of the law, which revealed that 'le rapport au conseil des ministres affirme . . . que le gouvernement ne reconnaîtra pas les mesures qui constituent une méconnaissance flagrante des principes du droit des gens'. The relevant provision of the Treaty of Versailles of 28 June 1919 has been similarly interpreted.² The English text of the second subsection of paragraph 1 of the Annex to Article 297 lays down that certain measures taken by the German authorities in invaded or occupied territory 'shall be void'—a phraseology which could be interpreted to mean that these measures required express abrogation by the Treaty. The French text, however, which is equally authoritative, speaks of 'toutes ces mesures restant nulles', and makes it clear that that provision of the Treaty was merely intended to affirm a pre-existing nullity. That was also the view adopted by a Mixed Arbitral Tribunal in the case of *Zurstrassen & Cie v. État allemand*.³ In that case it was argued on behalf of the

many by protecting interests the care of which was not entrusted to it, and by regulating the nature and effects of measures taken by the German authorities on foreign territory'. Had it considered the unlawful acts of the occupant void *ab initio*, irrespective of legislation, that objection would not have been valid.

¹ See, for example, *Bindels v. Administration des Finances*, *Pasicrisie Belge*, 1947, i, p. 269, at p. 275; *Deneffe v. Administration des Finances*, *ibid.*, 1948, i, p. 52, at p. 54; *Peters v. Administration des Finances*, *ibid.*, p. 156.

² Identical provisions may be found in the Treaty of St.-Germain-en-Laye of 20 September 1919 (Annex to Article 249); and the Treaty of Trianon of 4 June 1920 (Annex to Article 232).

³ *Recueil des décisions des tribunaux arbitraux mixtes*, 4 (1925), p. 326. The language of another Mixed Arbitral Tribunal, in the case of *Gros Roman & Cie v. État Allemand* (*ibid.*, p. 753), in which similar arguments were put forward, is open to the construction that the Treaty specifically abrogated unlawful measures of the occupant: 'cette réquisition, opérée en violation du droit des gens et déclarée nulle par le 2e alinéa du paragraphe 1er de l'annexe à la Section IV de la partie X du Traité de Versailles, n'a pas pu transférer la propriété des marchandises litigieuses à l'État allemand'. See also *Tencer v. Mining and Industrial Corporation Hrabia Renard* (*Annual Digest*, 1927-8, Case No. 381). In two other cases in which a Mixed Arbitral Tribunal was asked to decide that an unlawful seizure in occupied territory did not vest the property in the German state, the above-mentioned provision of the Treaty was not applied. In neither case did the Tribunal accede to the argument that the seizure was void, but both can be explained by reference to the particular circumstances. The case of *Tesdorpf v. German State* has been discussed above, p. 308. In the case of *Ralli Bros v. German Government* (*Recueil des décisions des tribunaux arbitraux mixtes*, 4 (1925), p. 41), the Anglo-German Mixed Arbitral Tribunal, while reluctant to 'apply the principles of private law concerning illegal dealings by private persons . . . to the acts of a belligerent State', was prepared to admit that such a juridical construction 'might perhaps be possible'. In the circumstances of the case, however, it felt bound to reject it. As in the above-mentioned cases, the plaintiff attempted to show that the property in dispute was still owned by him when it was brought to German territory after an unlawful seizure, and was therefore property 'injured on German territory' in the meaning of Article 297 of the Treaty of Versailles. The Court held, with some justice, that it seemed to be the clear intention of the framers of the Treaty not to make the method of indemnity provided for cases falling under Article 297 applicable to injuries suffered in occupied territory. This, incidentally, was also the final conclusion of the Court in the *Zurstrassen* case, *supra*.

claimant that certain property which had been unlawfully seized by Germany in occupied Polish territory and later transferred to Germany, was still owned by the claimant when it was brought to Germany, and was therefore allied property 'injured on German territory' in the meaning of Article 297 of the Treaty of Versailles, on which the jurisdiction of the Mixed Arbitral Tribunal to grant compensation was founded. It was held that 'les saisies de laines étant contraires aux conventions de La Haye de 1899 et 1907 qui limitent le droit de réquisition en pays occupé aux besoins de l'armée d'occupation, et le par. 1, al. 2, de l'annexe à l'article 297 du Traité de Versailles déclarant que les mesures de guerre prises par l'Allemagne en territoire occupé "restent nulles", la réquisition effectuée au préjudice de la requérante n'a pas pu transférer la propriété à l'État allemand'. In fact, had not the first subsection of paragraph 1 of the Annex to Article 297 validated all measures taken by the belligerents on their own, as opposed to occupied, territory, the sentence would probably have been otiose.

Secondly, some light has been thrown on the problem whether the intervention of the legislature is necessary for the annulment of unlawful acts of the occupant by the attitude of municipal courts which have been required to construe legislative enactments of the returning sovereign which either abrogate acts of the occupant as from the date of liberation¹ or temporarily continue his decrees in force² by reference to the question

¹ Such provisions often form part of a comprehensive regulation of the legislation of the occupant by the returning sovereign. Thus the Dutch Decree on Occupation Measures of 17 September 1944 divided the decrees of the occupant into four categories: Class A was declared never to have had legal validity; Class B to be inoperative as from the date of liberation; Class C to be provisionally maintained in force; and Class D to be suspended pending a final decision. Difficulties, in this connexion, arise with regard to Class B, and, to a lesser extent, Class C.

² An important question, which has not been discussed in this article, is whether decrees of the occupant *ipso facto* lose or retain their validity after the occupation. It would seem that legislation enacted in the sole interest of the occupant, and continuing rights acquired thereunder, cease to be operative as from the liberation of the territory. See, for example, a decision of the Court of Appeal of Crete of 1945 (*Revue hellénique de droit international*, 2 (1949), p. 302); two decisions of the Criminal Court of Heraklion of the same year (*Annual Digest*, 1943-5, Cases No. 151 and 162); *Anastasio v. Ministero dell'Industria e del Commercio*, decided by the Italian Council of State on 22 January 1946 (*Foro Italiano*, 69 (1944-6), iii, p. 82); *Lentini v. Ministero d'Interno* (ibid., p. 84); *Ancieri v. Commune of Procida* (ibid. 70 (1947), iii, p. 82); *De Giacomo v. Ministero d'Istruzione* (ibid., p. 171). And see *In re Hilado*, decided by the Supreme Court of the Republic of the Philippines on 30 April 1949 (*American Journal of International Law*, 44 (1950), p. 211). But see *Chop Sun Cheong Loong v. Lian Teck Trading Co.*, [1947] *Malayan Union Law Reports* 80, where it was held that a tenancy lawfully created by the occupant for his own purposes continued to have effect after the liberation. On the other hand, there is some authority for the view that acts done in the interest of the occupied state can have continuing effects reaching beyond the period of occupation. See, for example, *City of Malines v. Société Centrale pour l'Exploitation du Gaz* (*Annual Digest*, 1925-6, Case No. 362); *Zeeuwsche Hypotheek-Bank Ltd. v. State of the Netherlands* (*Nederlandse Jurisprudentie*, 1948, No. 108); a decision of the Supreme Administrative Tribunal of Poland of 6 December 1926 (*Annual Digest*, 1925-6, Case No. 363); a decision of the Supreme Court of Poland of 5 December 1924 (ibid., 1923-4, Case No. 243); and the decision of the Court of Appeal of Crete of 1945 cited above. But see *Woo Chan Shi v. Brown*, decided in 1946 by the Supreme Court of Hong Kong (*Annual Digest*, 1946, Case No. 156).

whether the legislature, by implication, considered unlawful acts of the occupant to have had legal validity during the period of occupation. The function of the courts in this connexion has been purely one of construction. This would seem to account for the divergent results reached by different courts. But it should be noted that where courts have held that the legislation of the returning sovereign must be construed to mean that the unlawful acts of the occupant were valid during the period of the occupation, they have stressed that this is so only because these acts have been retroactively validated. This is made particularly clear by a decision of the Supreme Court of Holland of 18 April 1947 in *Kloet v. Klok*.¹ The Court held that enemy ordinances which were declared to be inoperative as from the date of liberation, and ordinances which were provisionally maintained in force by the Dutch Decree on Occupation Measures, 'were to be treated *as though* they had been valid during the occupation, irrespective of whether this had really been the case'. Moreover, in several cases courts have refused to construe the legislation of the lawful sovereign in such a manner as to give recognition to unlawful acts of the occupant. The Special Criminal Court of The Hague, in the case of *Van Huis*,² decided on 15 November 1946, held that the fact that an Ordinance was declared to be inoperative as from the date of liberation did not necessarily mean that it had been declared to have been binding during the occupation. The Dutch Special Court of Cassation held, in the case of *Policeman Balster*,³ that the Decree on Occupation Measures must be considered to have left to the courts the task of deciding the validity of acts of the occupant in the light of international law. A Court of first instance of Turin, Italy, held on 22 January 1947 in the case of *Vallicelli v. Bordese and Ricco*,⁴ that a contract concluded in violation of an Allied occupation ordinance was valid, despite a proclamation of the Italian Government of 31 December 1945 to the effect that Allied proclamations were to be regarded as valid for the period when they were carried into effect, on the ground that the Allied Ordinance in question, which had exceeded the powers granted to an occupant by international law, was void.⁵

¹ *Nederlandse Jurisprudentie*, 1947, No. 38. The Court held that the legislature had been prompted by considerations of expediency. See also two earlier decisions of the same Court, *ibid.*, 1946, Nos. 308 and 326. And see *Ruocco v. Fiore*, decided by the Italian Court of Cassation on 2 February 1947 (*Foro Italiano*, 1947, i, p. 587). That case turned, in part, on the provisions of the Armistice Convention between Italy and the United Nations of 1943.

² *Na-oorlogse Rechtspraak*, 2nd year, 1946, No. 605. The Court rejected the contention of the accused, in this and the following case, that, as a policeman, he was bound to enforce such legislation of the occupant.

³ *Nederlandse Jurisprudentie*, 1947, No. 47.

⁴ *Foro Italiano*, 1947, i, p. 522.

⁵ Conversely, the Supreme Court of Singapore Colony held, in the case of *Cheang Sunny v. Ramanathan Chettiar*, [1948] *Singapore Law Reports* 12, decided on 16 February 1948, that the express validation of certain acts of the occupant by the returning sovereign did not imply that all other acts were to be regarded as invalid, irrespective of whether they had legal validity

Thirdly, it may be useful to inquire whether the repeated affirmation, in treaties, of the nullity of unlawful acts of the occupant does not show the existence of a customary rule in the matter. Admittedly, states are free to agree on any provision whatsoever, and the fact that they have repeatedly included identical provisions in treaties neither serves, necessarily, to establish a customary rule in the matter, nor to demonstrate its previous existence. However, as shown, the phraseology of the relevant provisions in the Treaty of Versailles, the Treaty of Trianon, and the Treaty of St.-Germain-en-Laye suggests that the signatory states recognized the existence of a principle that unlawful acts of the occupant are void. It is submitted that other treaties also provide some ground for the view that the signatories recognized the existence of some such principle. Thus, although the Treaty of Lausanne, of 24 July 1923, contained no provision expressly abrogating or declaring the nullity of unlawful acts committed by the belligerent occupant, Article 65 provided for the restitution of 'property, rights and interests . . . which belong to . . . Allied nationals', that is, property the legal title to which must be considered to have still been vested in such persons. Article 67, which provided mainly for administrative measures, made it clear that property 'taken away, seized or sequestered' on occupied territory was to be restored.

The first instrument in the Second World War which is of importance in this connexion is the United Nations Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control, of 5 January 1943. In form that Declaration was merely a statement of policy. The signatories also seemed to visualize the express abrogation of unlawful measures by the returning sovereign.¹ It was stated: ' . . . the Governments making this Declaration . . . reserve all their rights to declare invalid any transfers of, or dealings with, property. . . .' However, in the Peace Treaties concluded with Italy, Bulgaria, Hungary, and Roumania on 10 February 1947, it is provided that the defeated state 'accepts the principles of the United Nations Declaration of 5 January 1943 and shall return, in the shortest possible time, property removed from the territory of any of the United Nations'.² Prima facie, it has been suggested, the Declaration contains no principle. The rightful sovereign may have the power to invalidate the acts of the belligerent occupant and, being victorious, to require the restitution of property seized during the occupation

according to international law. The Court emphasized that, had the Legislature decided that the relevant principle of international law was not to be followed, it could—and no doubt would—have legislated accordingly.

¹ See on this also the Explanatory Memorandum issued by the Parties to the Declaration (Cmd. 6418, Misc. No. 1, 1943).

² Treaty with Italy, Article 75; Treaty with Bulgaria, Article 22; Treaty with Hungary, Article 24; Treaty with Roumania, Article 23.

in the Treaty of Peace. But the recognition of this power could only by a misuse of words be described as the acceptance of a 'principle'. There may, accordingly, be some force in the suggestion that the major principle underlying the United Nations Declaration of 1943, and subsequently accepted by the defeated states, is that the unlawful acts of a belligerent occupant can have no legal validity. Support is lent to this view by the fact that the treaties with the German 'Satellites' provide that property removed by German forces from their territory after the date on which they joined the United Nations—as all of them eventually did—and hence after the date on which these German forces, which had hitherto been friendly armies, became forces of occupation, 'shall be eligible for restitution'.¹

III. *Recognition and enforcement of acts of the occupant by courts of third states*

Decisions of the courts of third states also throw some light on the questions which have here been discussed. These courts are faced with the problem of the legal nature of acts of the occupant in the following form: where the rules of the conflict of laws in any given case refer to the law of the occupied territory, does that law include provisions enacted by the occupant, and, if so, what are the effects of the violation, by the occupant, of the rules of international law relating to belligerent occupation?

With regard to the first question, adherents of the view that the authority of a belligerent occupant is purely factual would be compelled to hold that, in the eyes of third states, the occupant is in a position similar to that of an entirely unrecognized government,² whose laws and decrees are legally irrelevant. In one case a Swiss Court of first instance was inclined to take that view.³ The Court was called upon to decide whether the administrators appointed by the German authorities in occupied Poland to liquidate a local Company should be permitted to intervene in an action brought by the Company in its own name for the recovery of property deposited with Swiss banks. It held that they must be denied the right to intervene, on the ground that 'l'occupation est un simple fait de guerre ne pouvant entraîner aucune conséquence juridique nouvelle, en tout cas pour les États neutres'. So sweeping a statement was probably unnecessary in that case; the

¹ Treaty with Finland, Article 28 (2); Treaty with Bulgaria, Article 26 (2); Treaty with Hungary, Article 30 (2); Treaty with Roumania, Article 28 (2).

² This is also the view of Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), p. 142.

³ *Société de Sosnowice v. Banque de dépôts et de crédit, Eidmann et Falkenhann*, decided on 30 October 1917 by the Court of first instance of Geneva (*Revue de droit international privé*, 14 (1918), p. 190). See, to a similar effect, some instances cited by Sauser-Hall in *Annuaire suisse de droit international*, 1 (1944), p. 117.

rationale of the decision would appear to have been the fact that the measure in question not only exceeded the powers of the occupant, but was in direct contravention of Article 46 of the Hague Regulations, which provides that private property must be respected. However, that view has not been shared by other courts. Thus a Dutch Court of first instance held, on 22 May 1917, that a German decree issued in occupied Belgian territory, which was enacted with the object of ensuring public order and which was also in conformity with the law of the occupied territory—which was, accordingly, wholly in conformity with Article 43 of the Hague Regulations—must be applied to a claim which was governed by Belgian law. The Court stated that the German decree had ‘force of law’ in Belgian territory occupied by the enemy.¹ Another Dutch Court held, in the case of *Vitse v. Brasser and the State of the Netherlands*,² decided on 18 February 1948, that title to property requisitioned by the German army in France in accordance with Article 52 of the Hague Regulations vested in the German state and could be transferred to private persons. An Australian Court, in the case of *Anglo-Czechoslovak and Prague Creditbank v. Janssen*,³ decided in 1943, was called upon to recognize the legal effects of German acts in Czechoslovakia. The case was decided on the assumption that the authority of Germany in Czechoslovakia was analogous to that of a belligerent occupant. It was held that the acts in question—the dissolution of a Czechoslovak bank—could not be recognized. But the Court stated, *obiter*, that

‘Such acts of the occupying enemy as are strictly necessary for the protection of inhabitants of that country, and of his own army of occupation, and for the maintenance of order therein may be recognised in the King’s Courts as having legal effect there and some operation and effect may be given to them outside the occupied territory.’

A similar view was expressed by a Court of first instance of Milan on 10 June 1949,⁴ and by a United States District Court on 16 June 1951.⁵ It has also been affirmed by writers of authority that the legitimate acts of the occupant will—and ought to be—recognized by the courts of neutral states. Sir Arnold McNair, to give one example, states that

‘the principle is that, the occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants, and having a right recognised by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realisation of the legitimate purposes of his

¹ Decision of the District Court of Breda of 22 May 1917 (*International Law Notes*, 2 (1917) pp. 127 ff.). See, to the same effect, *Cillekens v. De Haas*, decided by the District Court of Rotterdam on 14 May 1919 (*Annual Digest*, 1919–22, Case No. 336). The German Decree which was invoked in these two cases continued in force a moratorium originally instituted by the Belgian Government prior to the occupation.

² *Nederlandse Jurisprudentie*, 1948, No. 640.

³ [1943] V.L.R. 185.

⁴ *I. G. Farbenindustrie, A. G. v. Compagnia Farmaceutica Cofa* (*Foro Padano*, 1949, i, p. 678).

⁵ *Aboitiz & Co. v. Price* (99 F. Supp. 602).

occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits, will be recognised by the British Government and by British courts of law'.¹

With regard to the second problem there is some authority to the effect that third states must deny recognition and enforcement to acts of the occupant which are contrary to international law. In *Aboitiz & Co. v. Price*² the United States District Court for Utah held, on 16 June 1951, that Japanese decrees which were promulgated in the Philippines during the occupation of that territory, and which prohibited loans of money to internees, could not be recognized as valid, and that contracts made in breach of such decrees were enforceable. It did so on the ground that the decrees in question were contrary to international law. Similarly, an Australian Court held, in the above-mentioned case of *Anglo-Czechoslovak and Prague Creditbank v. Janssen*, that recognition could not be accorded to the dissolution of a Czech bank by the German occupant, on the ground that the courts of third states could not be expected to uphold the decrees of the occupant regardless of the limits imposed by international law on his legislative power. Moreover, in the above-cited Swiss decision the Court refused to recognize as valid the appointment, by the German occupant in Poland, of administrators to liquidate a company, in violation of Article 46 of the Hague Regulations. It held that 'en reconnaissant aux intervenants le droit de représenter la Société de Sosnowice et de disposer de ses biens, le Tribunal renierait la signature de la Suisse apposée sur les Conventions de la Haye'. The phraseology is significant. But the decision is unsatisfactory for several reasons. In the first instance, while the fact of the illegality of the act of the occupant would seem to have been the predominant consideration, the passage cited earlier leaves some doubt as to the view of the Court on the nature of belligerent occupation in general. Moreover, while we may infer from the fact that the Court refused to recognize both the right of the administrators to represent the company and their right to dispose of its assets, that it considered the law of the occupant inapplicable both to the act which took effect on the occupied territory and to assets situated on the territory of the forum, the latter may have been the predominant consideration. If this is so, the case could be regarded as an instance of the general refusal of neutral states to enforce belligerent legislation on their territory—in the same manner as states refuse to enforce foreign confiscatory legislation—on the ground that the enforcement of such legislation is not the proper function of courts in a neutral state and is tantamount to assistance to belligerents.³

¹ *Legal Effects of War* (3rd ed. 1948), p. 337. Sauser-Hall, in *Annuaire suisse de droit international*, 1 (1944), pp. 108 ff., limits that principle by reference to the consideration that the occupant lacks competence to enact legislation with extraterritorial effect.

² 99 F. Supp. 602.

³ The same applies, to some extent, to the Australian decision.

Referring to the decision in *Bank of Ethiopia v. National Bank of Egypt and Liguori*,¹ where Clauson J. recognized the validity of a decree of the Italian Government, which had recently conquered Ethiopia, purporting to liquidate the Bank of Ethiopia, Sir Arnold McNair writes as follows:

'With great respect it is submitted that Clauson, J., in this judgment has invested a Government in belligerent occupation of the territory of another with a degree of power which it is difficult to reconcile with the rules of international law as accepted by this country. . . . The value of rules governing belligerent occupation and defining the powers of an occupant is sensibly diminished if within six weeks of his arrival in the enemy capital and before he has brought the whole country under his control he is to be invested with the full panoply of sovereignty—his acts having the "status of acts of a fully responsible government".'²

Professor Quincy Wright, criticizing the same decision, gives even more emphatic expression to the same view:

'Doubtless there are definite rules of international law limiting the authority of a military occupant during the course of war. Acts of such a *de facto* authority which ignore these limitations, even though functioning locally, should be regarded as *ultra vires* and void by a foreign Court.'³

The problem of the enforcement of the acts of the occupant by neutral courts has, particularly in relation to the transfer of property, been obscured by the intervention of legislative enactments, both on the part of the returning sovereign, and of the state of the forum, and of treaties concluded by them.⁴ However, with regard to legislation by the state of the forum it may

¹ [1937] Ch. 513. The decision itself has no useful bearing on the problem of belligerent occupation; it was decided on the assumption that Italy had acquired *de facto* sovereignty over Ethiopia. Altogether the question of recognition of annexation has served to distract courts from the real problem before them of the legal effect of acts of a belligerent occupant. Thus in *Koninklijke Lederfabriek 'Oisterwijk' N.V. v. Chase National Bank of City of New York* (*Annual Digest*, 1941-2, Case No. 172) the Supreme Court of New York declined to enforce a decree of the German authorities in occupied Holland placing Dutch companies under compulsory administration, and to permit the administrator of such a company to claim assets situated in the United States, on the ground that the occupant 'has not been recognised by our State Department as the lawful existing government in the territory in question'. Similarly, the same Court held in *Amstelbank, N.V. v. Guaranty Trust Co. of New York* (*ibid.*, Case No. 171), in relation to similar facts, that the Government of the United States had refused to recognize the German control of Holland, and that acts of the occupant could therefore not be regarded as acts of a 'lawful sovereign'. In both cases the same result could have been achieved by the affirmation that acts of the occupant which violated Article 46 of the Hague Regulations could not be regarded as valid, or by the application of the more general principle that belligerent legislation will not be enforced by a neutral state in relation to property on its territory. It has been suggested, however, that the refusal to 'recognise' the belligerent occupation may perhaps be explained by reference to the illegality of the war undertaken by Germany, and may amount to an acceptance of the principle that an aggressor cannot acquire title to property by the exercise of the powers normally granted to a belligerent occupant. See Lauterpacht, 'Rules of Warfare in an Unlawful War', in *Festschrift für Hans Kelsen* (1952).

² *Legal Effects of War* (3rd ed., 1948), pp. 340 f. See also Sauser-Hall in *Annuaire suisse de droit international*, 1 (1944), p. 73.

³ In *American Journal of International Law*, 31 (1937), p. 687.

⁴ For an example of a treaty regulating the effects of belligerent occupation see the agreement between Switzerland and the United Nations of 8 March 1945.

be noted, again, that its main purpose would appear to be to define the rights and obligations of innocent third parties.¹ It does not, in principle, derogate materially from the general law. This was stressed by the Swiss Federal Tribunal in its decision of 3 June 1948 in the case of *Rosenberg v. Fischer*.² This was a claim for the restitution of works of art seized by the German authorities in occupied France and later sold to the defendant. The Court held that the Swiss Ordinance of 10 December 1945, which provides for the restitution of property seized in violation of international law, was basically in conformity with the general law. It said:

'A purchaser in bad faith of unlawfully seized property (*bien spolié*) is bound to restore it to its owner (Article 936 of the Civil Code). The same is true of the purchaser in good faith as long as the right of the owner has not been extinguished by the expiration of the period of limitation, provided, however, that he has not acquired the chattel concerned in market overt or from a dealer in similar objects, in which case he is bound to grant restitution only subject to reimbursement. In fact, an object seized from its owner in a manner contrary to international law has, without doubt, the character of stolen or lost property in the meaning of Article 934, paragraph 1, of the Civil Code.'³

The legislation of the lawful sovereign of the occupied territory, moreover, cannot of itself annul the legal transfer of property which has reached a third state. For the legislation of a state cannot, in general, affect property which is outside its territorial jurisdiction. Assuming that a legal title was created by the transfer of the property by the occupant to a neutral subject the legislation of the returning sovereign would in most cases be powerless to destroy it outside the area of its territorial jurisdiction.⁴ The fact of the specific abrogation of unlawful acts of the occupant, or the recognition of such abrogation, by third states does not, therefore, establish that these acts were considered by third states to have been previously valid.

¹ See, for example, the Swiss *Bundesratsbeschluss betreffend die Klagen auf Rückgabe in kriegsbesetzten Gebieten weggenommener Vermögenswerte*, of 10 December 1945, which regulates the restitution of property by possessors both in good and in bad faith.

² *Annuaire suisse de droit international*, 6 (1949), p. 139.

³ See also the remarks made by the same Court on 24 June 1948, in a similar claim (*P. v. A.G.K. and P.*, *ibid.* 7 (1950), p. 160), with regard to the question as to what, in this connexion, constitutes bad faith: 'Article 3, para. 2, of the Civil Code provides that persons who neither knew nor suspected the true state of affairs, but who must have recognised the possibility of its existence if they acted with reasonable care, must be considered to have acted in bad faith. The same principle is applicable to the Federal Ordinance of December 10, 1945. Admittedly there was no Swiss legislation in force during the war which treated property seized in violation of international law as stolen property. This does not mean, however, that the purchaser of movable chattels at the time was not bound to consider whether the chattels in question had been so seized. It was already then a dictate of morality, and after the serious warnings of the Allies, which announced the intention of reclaiming German booty, a dictate of caution, to having nothing to do with such property.'

⁴ This would seem to be the view underlying the statement of Professor Guggenheim, in *Hague Recueil*, 74 (1949), p. 244, in reliance on the decision of the Swiss Federal Tribunal in *Rosenberg v. Fischer* (*supra*), that third states are bound to recognize the retroactive abrogation of acts of the occupant only if these were in violation of international law.

Conclusions

The conclusions of this article may be summarized as follows:

1. The provisions of the Hague Regulations relating to belligerent occupation have become part of the municipal law of most states and are thus directly binding on private persons in so far as they relate to their conduct. Articles 43 and 52 of the Hague Regulations, which grant the occupant certain rights and impose upon him certain duties in relation to the inhabitants of the occupied territory, must be considered to relate to the conduct of the civil population. They lend force of law to the acts of the occupant authorized by them. Both the inhabitants and the returning sovereign are bound by such measures. Any conflict which arises between a legal obligation so derived from international law, and an obligation under municipal law to give no assistance to the enemy must be resolved by regarding the former as a *lex specialis* which forms an exception to the latter.

2. On the other hand, acts of the occupant which are prohibited by the Hague Regulations are denied enforcement by the courts of the occupied territory both during and after the occupation. No real exception to this is provided by the fact that municipal courts will not examine whether legislative measures which *prima facie* could be intended to safeguard public order were in fact necessary. For international law invests the occupant with discretionary powers for the maintenance of order. Moreover, express legislative provisions of the returning sovereign which retroactively annul unlawful acts of the occupant would seem to have been enacted *ex abundante cautela*. They have often been interpreted in a manner which shows that courts consider the nullity of unlawful acts of the occupant to be independent of any express act of invalidation.

3. The attitude of the courts of third states bears out the foregoing propositions. They have enforced, in cases to which the law of the occupied territory applied, legislative measures of the occupant which were authorized by international law. Conversely, there is some authority for the view that they will deny enforcement to laws of the occupant which the latter lacked competence under international law to enact.

From whatever angle the subject is examined, we find corroboration of the view that belligerent occupation is a legal régime circumscribed by the limits which international law places on the authority of the occupant. Within these limits—and these limits only—the acts of the occupant derive from international law a legal force which is binding both on the inhabitants and on the returning sovereign. Where the limits are exceeded the acts of the occupant are *ultra vires*, and are absolutely void, even though the occupant may have the physical power to give them practical effect. The

position thus stated seems satisfactory both from the point of view of legal principle and of practical convenience. It represents both an affirmation of the authority of international law and a compromise between the conflicting interests involved, namely, the legitimate¹ interest of the occupant in the furtherance of his war effort and the safety of his army, and the equally legitimate interest of the occupied state in the defeat and expulsion of the occupant, and in the protection of the civil population.

Moreover, these principles of the law of belligerent occupation throw significant light on the nature of the relationship between international law and municipal law. In the first instance, the fact that lawful acts of the belligerent occupant derive their legal validity from international law lends some force to the view that legal authority within the state is delegated by international law. Whereas the law-making power of the sovereign state within its own territory appears to rest primarily on effectiveness, we have here an instance of legal force being attributed solely to acts which, in addition to being effective, are in conformity with international law. Secondly, the circumstance that acts of the belligerent which violate international law are denied legal effect by the courts of the occupied country is also tantamount to recognition of the supremacy of international law. Normally, the acts of organs which lack competence under international law are not void in the municipal sphere. These discrepancies are probably due to the fact that belligerent occupation, generally, may be said to present a situation which is exceptional in two ways. On the one hand, the courts of the occupied country are not the organs of the occupant; accordingly they are not necessarily bound by his acts. On the other hand, as shown earlier, in the present state of international organization unlawful acts of an occupant can more easily be redressed than those of a sovereign state within its own territory, precisely because there are municipal organs, both during and after the occupation, which are capable of giving effect to the

¹ It has been assumed throughout that the occupant is a lawful belligerent. However, as a result of the Pact of Paris and the Charter of the United Nations, sovereign states are no longer free to resort to war at their discretion. It is, accordingly, of some importance to consider whether the principles of the law of belligerent occupation are affected by the illegality of the act of the occupant in resorting to war in violation of his international obligations. It would seem that, in so far as the rules of belligerent occupation are, as suggested above, a compromise between the occupant's interest in the safety of his army and the occupied state's interest in the protection of the civil population, the ordinary rules of belligerent occupation must be maintained even in an unlawful war. For if the civil population were entitled to deny obedience to the 'unlawful' occupant and to commit acts of hostility against him, he would, in effect, be freed of the obligation to treat the population in accordance with international law. Humanitarian considerations accordingly compel the view that it is essential to maintain the operation of the rules of war regardless of the illegality of the war. On the other hand, there is room for the view that an aggressor should not be able to enrich himself by means of otherwise lawful acts such as requisitions. In this connexion humanitarian considerations have no application. There is thus no obstacle to the operation of the principle *ex injuria jus non oritur*. For a searching examination of the whole question of the applicability of the rules of warfare in an unlawful war see Lauterpacht in *Festschrift für Hans Kelsen* (1952).

dictates of international law. However, these differences suggest that the principles of the law of belligerent occupation may be helpful in revealing the true nature of the relationship between international law and municipal law. They indicate that any divergence of the municipal law of sovereign states from international law is the result of the imperfect development of machinery for the enforcement of international law, rather than of a failure to recognize its overriding authority.

SO-CALLED 'UNPRIVILEGED BELLIGERENCY': SPIES, GUERRILLAS, AND SABOTEURS

By MAJOR RICHARD R. BAXTER, B.A., LL.B.¹

IN an article in the previous issue of this *Year Book*² the duty of the inhabitant of occupied territory to refrain from conduct hostile to the occupant was assessed in the light of recent developments in the law, notably of the prosecutions for war crimes following the Second World War and the Geneva Conventions of 1949. It was suggested there that it is merely the superior power of the occupant rather than a precept of international law which forbids the inhabitant to injure the occupying Power. In arriving at that conclusion it was necessary to assess the roles played in the law of belligerent occupation by the military power of the occupant, by international law, and by municipal law. However, the somewhat perplexing question of the scope to be given to each of these elements is not confined to the law of belligerent occupation alone. It is present in an equally acute form in connexion with the problem of spies, guerrillas, saboteurs, secret agents, and other unlawful belligerents operating in areas which are not under belligerent occupation.

I. *International law applied to war*

Essentially, the outbreak of war³ creates an area of anarchy in the world order, an area in which the normal law applicable to the peaceful intercourse of states is suspended. The propriety of statements that international law confers a 'right' to resort to war and to exercise 'belligerent rights'⁴ is highly questionable, and it is probably more accurate to assert that international

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² Baxter, 'The Duty of Obedience to the Belligerent Occupant', in this *Year Book*, 27 (1950), p. 235.

³ The word 'war', as used herein, refers not only to declared war but also to other cases of armed conflict and to the occupation of another state's territory even if the occupation meets with no armed resistance. The law of land warfare was apparently applicable to such situations even before the adoption of the Geneva Conventions of 1949 (see *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (Cmd. 6964, H.M.S.O., 1946), p. 125, with reference to the occupation of Czechoslovakia), and the Conventions themselves are expressly made applicable to these various types of employment of armed force (common Article 2).

⁴ Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861), p. 312; Hall, *A Treatise on International Law* (7th ed. by Higgins, 1917), pp. 389, 411; and see Jessup, *A Modern Law of Nations* (1948), p. 157. Although the title is somewhat misleading, Dr. Spaight makes plain early in his *War Rights on Land* (1911) that the 'rights' to which he refers are those of individuals to be protected in certain respects from the rigours of war (pp. 1-4).

law has dealt with war as a state of fact which it has hitherto been powerless to prevent. Animated by considerations of humanity and by the desire to prevent unnecessary suffering, states have nevertheless recognized limits on the unfettered power which they would otherwise actually enjoy in time of war. The law of war is, in the descriptive words of a war crimes tribunal, 'prohibitive law',¹ in the sense that it forbids rather than authorizes certain manifestations of force. During the formative period of codified international law, delegates to international conferences repeatedly declared that they would not accept proposed provisions which involved acquiescence in an enemy's exercise of jurisdiction over nationals of their state.² The report of the committee which dealt with the laws and usages of war to the Hague Conference of 1899 emphasized that it was not intended by Convention No. II to sanction the employment of force and that the purpose of the Convention was rather to restrict the exercise of power which an enemy might in fact wield over another state.³

War, conceived as a condition approximating to a state of international anarchy, is not an armed conflict between states as abstract entities. It is rather a conflict between populations, in which each national of one belligerent is pitted against each national of the other. Without the humane intervention of international law, war would entail death or enslavement for the combatant or non-combatant overcome by the enemy. To ancient Greece, all inhabitants of an enemy state were themselves enemies whose persons were at the mercy of the conqueror, to be killed or made slaves as expediency might dictate,⁴ and it has been said that only considerations of political policy dissuaded the Romans from following a like course.⁵ Even through the Middle Ages it was the practice to kill infidels and to enslave Christians captured in war.⁶ Since the founders of modern international law were not prone to overlook the verdict of the past, they were forced to admit that every enemy could in strict law be subjected to violence and could

¹ *United States v. List et Al.* (1948): *Trials of War Criminals*, xi (1950), pp. 1247, 1252, *Law Reports of Trials of War Criminals* (hereinafter referred to as '*War Crimes Reports*'), viii (1949), p. 66.

² See, for example, the remarks of the Netherlands delegate, concurred in by the Italian and Belgian delegates, to the Brussels Conference of 1874 (*Actes de la Conférence de Bruxelles* (1874), pp. 43-44, 204) and those of the Netherlands and Belgian delegates concerning uprisings in occupied areas (*ibid.*, pp. 158-65).

³ 'Besides, no member of the subcommission had any idea that the legal authority in an invaded country should in advance give anything like sanction to force employed by an invading and occupying army. On the contrary, the adoption of precise rules tending to limit the exercise of this power appeared to be an obvious necessity in the real interests of all peoples whom the fortune of war might in turn betray' (Report to the Conference from the Second Commission on the Laws and Customs of War on Land, in *Reports to the Hague Conferences of 1899 and 1907* (ed. by Scott, 1917), p. 140; see also pp. 140, 151 for like statements).

⁴ Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911), vol. ii, p. 251.

⁵ *Ibid.*, p. 253.

⁶ Nys, *Le Droit de la guerre et les précurseurs de Grotius* (1882), pp. 115-18, 138-43.

only urge that non-combatants be spared from attack as an act of mercy.¹ It is significant that the ancient form of declaration of war, which called upon the subjects of the declarant to do violence to the subjects of the enemy, continued in use even into the eighteenth century.² Although the declaration lost much of its literal sense with the passage of time, the view that war makes individuals in belligerent nations enemies one to the other persisted throughout the eighteenth³ and nineteenth centuries⁴ and still perhaps serves as a fundamental assumption of the law.⁵ The courts of the United States have been particularly prone to start from the premiss that all inhabitants of the enemy state and all persons adhering to it are enemies, notably in connexion with property rights,⁶ treasonable conduct,⁷ and commercial intercourse with the enemy at common law.⁸

Despite vast improvements in the lot of those who are without means of defence in war,⁹ a number of tendencies are at work the effect of which is once more to extend, rather than to diminish, the extent to which each enemy national is involved in war. The first of these is the fact that

¹ Grotius stated that, 'In general, killing is a right of war' (*De Jure Belli ac Pacis* (1646 ed., transl. by Kelsey, 1925), Book iii, ch. iv, v. i), '... according to the law of nations, any one who is an enemy may be attacked anywhere' (ibid., viii. 1), and 'How far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity' (ibid., ix. 1). It was the 'bidding of mercy' which called for the protection of certain categories of persons, such as children, women, old men, priests, writers, farmers, merchants, prisoners of war, suppliants, and those who gave themselves up to the victor (ibid., ch. xi, viii-xiv incl.). See also Rachel, *De Jure Naturae et Gentium Dissertationes* (1676), *Dissertatio Altera De Jure Gentium*, xlv, xlvii.

² '[La Déclaration de Guerre] autorise, à la vérité, il oblige même tous les sujets, de quelque qualité qu'ils soient, à arrêter les personnes & les choses appartenantes à l'Ennemi, quand elles tombent entre leurs mains; mais il ne les invite point à entreprendre aucune expédition offensive, sans Commission, ou sans ordre particulier' (Vattel, *Le Droit des gens* (1758), Book iii, ch. xv, § 227; see Von Martens, *A Compendium of the Law of Nations* (transl. by Cobbett, 1802), p. 287 n. The last formal declaration of war, made by Great Britain in 1762 against Spain, which followed this form of words, is quoted in Twiss, *The Law of Nations considered as Independent Political Communities; On the Rights and Duties of Nations in Time of War* (1863), p. 85.

³ In *Quaestionum Juris Publici Libri Duo* (1737), Van Bynkershoek declares that although the right of executing the vanquished has 'almost grown obsolete', this result is solely the consequence of clemency (Book i, ch. iii, p. 18).

⁴ Twiss, op. cit., p. 84; Halleck, op. cit., p. 411. The texts uniformly stated, however, that usage or custom or law had confined the actual conduct of hostilities to the warring sovereigns and their troops.

⁵ The *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 5, takes this view.

⁶ *Juragua Iron Co., Ltd. v. United States* (1909), 212 U.S. 297, 306-7; *United States v. Pacific RR. Co.* (1887), 120 U.S. 227, 233, 239; *Young v. United States* (1877), 97 U.S. 39, 61; *Lamar v. Browne et Al.* (1875), 92 U.S. 187, 194.

⁷ *Stephan v. United States* (6th Cir. 1943), 133 F. 2d 87, 94, cert. denied (1943), 318 U.S. 781, rehearing denied (1943), 319 U.S. 783; *United States v. Fricke* (S.D.N.Y. 1919), 259 Fed. 673, 675.

⁸ *White et Al. v. Burnley* (1857), 20 How. 235, 249; *The Rapid* (1814), 8 Cranch 155, 161; *Griswold v. Waddington* (1819), 16 Johns (N.Y.) 438, 447; *Grinnan et Al. v. Edwards et Al.* (1883), 21 W. Va. 347, 357.

⁹ 'Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder' (*Johnson v. Eisentrager* (1950), 339 U.S. 763, 768).

contemporary conflicts are often fought in pursuance of an ideology. A burning conviction concerning a political or social philosophy may offer both an incitement and a rationalization for the extirpation of all those whose ideas are considered to be evil.¹ The second factor, a technological one, is that it has become increasingly difficult to differentiate between what were once distinguishable as 'military' and 'non-military' objectives, in the choice of target, in the aiming of the weapon, and in the destruction which it causes. That populations are, particularly in the stage of attack and active hostilities, increasingly subjected to the impact of war is a development in warfare of which international law cannot fail to take account.² Thirdly, the civilian has often voluntarily become a participant in warfare, as a guerrilla or as a member of the underground or as a secret agent, requiring, *inter alia*, stringent control of his activities or even internment if he is present on the domestic territory of a belligerent.³

The law of war has exercised its 'prohibitive' effect with respect to those persons who are in the power of the enemy and would otherwise be subject to the extreme licence of war by extending special protection to certain categories of such individuals. The most familiar of these are the wounded and sick of the armed forces and so-called 'lawful belligerents', who, upon their coming into the hands of the enemy, become prisoners of war endowed with specific rights. Until comparatively recently the protection of civilian non-combatants has been on a somewhat primitive basis, resting as it did upon certain broad principles of international law and scattered provisions of the Hague Regulations, particularly those relating to belligerent occupation. With respect to those actually interned by a belligerent, the protection of the law of nations was so imprecise as to require their being placed in the status of prisoners of war, although they were not belligerents.⁴ Such considerations as these, coupled with the suffering to which civilians were exposed during the Second World War, were compelling reasons for the adoption of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

Outside these three classes of persons to whom international law has offered shelter from the extreme violence of war, there are other persons who traditionally have not benefited from a privileged status under

¹ Wright, *A Study of War* (1942), vol. ii, p. 160.

² Gutteridge, 'The Geneva Conventions of 1949', in this *Year Book*, 26 (1949), pp. 294, 319; Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War', in *American Journal of International Law*, 39 (1945), p. 680.

³ See Cohn, 'Legal Aspects of Internment', in *Modern Law Review*, 4 (1940-41), p. 200; Parry, 'The Legal Status of Germany and of German Internees', *ibid.*, 10 (1947), p. 403; with respect to the practice of the United States see *Hirabayashi v. United States* (1943), 320 U.S. 81.

⁴ *R. v. Superintendent of Vine St. Police Station; Ex parte Liebmann*, [1916] 1 K.B. 268; *R. v. Bottrill; Ex parte Kuechenmeister*, [1947] 1 K.B. 41; the United States followed the same practice during the Second World War (Field Manual 27-10, *Rules of Land Warfare* (1940), par. 70).

international law, namely, guerrillas, partisans, so-called 'war-traitors', *francs-tireurs*, and other persons who, in the face of the enemy or behind his lines, have committed hostile acts without meeting the qualifications prescribed for lawful belligerents.¹ The determination of the requirements to be established for those claiming prisoner-of-war status has not been easy, and it has been equally troublesome to assess the basis on which persons not so qualifying should be penalized or punished—whether as war criminals, or as violators of the laws and customs of war, or merely as persons whose acts have been harmful to the opposing belligerent. It has generally been understood that such persons are subject to the death penalty, and to that extent the law applicable to such combatants has been clear. The Geneva Conventions of 1949 have, however, instead of clarifying the status of these individuals, destroyed what little certainty existed in the law. It is probably safe to say that the Conventions are at their weakest in delineating the various categories of persons who benefit from the protection of each.

Article 4 of the Geneva Prisoners of War Convention of 1949 defines prisoners of war as including the members of the armed forces, militia and volunteer corps conforming with specified requirements, civilians accompanying the armed forces, the crews of merchant ships and civil aircraft, and *levées en masse* in unoccupied territory.² Members of resistance movements who are commanded by a responsible person, wear a 'fixed distinctive emblem', carry arms openly, and conform with the law of war, even if operating in occupied territory, were extended the protection of prisoner-of-war status because of difficulties encountered in securing equitable treatment for guerrillas and members of resistance movements during the Second World War.³ Fears that the opposing belligerent will be put at a military disadvantage by being required to treat such persons as prisoners of war⁴ are probably based on the erroneous assumption that all persons engaged in resistance activities will meet the qualifications prescribed in Article 4. It is reasonable to suppose that guerrillas and members of

¹ Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 454; *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 82; Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1945), vol. iii, p. 1797; Field Manual 27-10, par. 348.

² Article 1 of the Geneva Prisoners of War Convention of 1929 and Article 4 of the corresponding 1949 Convention purport to define the persons entitled to be treated as prisoners of war, while Article 1 of the Hague Regulations sets out to define the troops to whom the 'laws, rights, and duties of war apply'. Since persons both civilian and military have been considered to be protected by and subject to the laws, rights, and duties of war in connexion with war crimes prosecutions, there is reason to believe that Article 1 of the Hague Regulations is now to be interpreted only as defining those who are entitled to be prisoners of war upon capture and that, as to the signatories to the Prisoners of War Conventions of 1929 and 1949, the former definition has been superseded.

³ *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, International Committee of the Red Cross (1947), pp. 107-8.

⁴ Strebel, 'Die Genfer Abkommen vom 12. August 1949—Fragen des Anwendungsbereichs', in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 13 (1950), pp. 133-41.

resistance movements will more frequently than not fail to conform to these standards, since secrecy and surprise are the essence of such warfare.

Do then persons engaged in hostilities of a clandestine nature benefit from the protection of any other status? According to the letter of Article 4 of the Geneva Civilians Convention of 1949, persons who 'in any manner whatsoever, find themselves, . . . in the hands of a Party to the conflict' and do not benefit from one of the other Conventions are protected by that Convention. As indicated in the article referred to above,¹ persons guilty of hostile activities in occupied areas are subject to a special régime analogous to a system of municipal law, and spies and guerrillas in such areas are thus in something approaching a protected status. Article 5 of the same Convention, in addition to limiting the extent to which the Convention is applicable to persons guilty of hostile acts in occupied territory, states with respect to the 'territory of a Party to the conflict' that 'an individual protected person' (i.e. any person in enemy hands not otherwise protected) who is engaged in or suspected of hostile activities is not entitled to claim such rights and privileges under the Convention as would imperil the security of the detaining state. This language, and the absence of provisions elsewhere which would preclude strong action against captured unlawful belligerents, are indicative of an intention on the part of the draftsmen of the Convention not to exclude the customary penalties inflicted upon belligerents of this nature. Furthermore, the failure of Article 5 to refer to areas where fighting is in progress outside occupied territory or the territory of the detaining state suggests that both Articles 4 and 5 were directed to the protection of inhabitants of occupied areas and of the mass of enemy aliens on enemy territory and that unlawful belligerents in the zone of operations were not taken into account in connexion with the two articles. It is reasonable to conclude that no provision of the Geneva Conventions of 1949 precludes the death penalty for unlawful belligerents in other than occupied territory² and that, *a fortiori*, lesser penalties may be imposed.

A category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 thus continues to exist and to be subject to the maximum penalty which the detaining belligerent desires to impose. Individuals of this nature taken into custody for hostile conduct in occupied territory are, of course, the beneficiaries of a considerable number of procedural and substantive safeguards. But their counterparts in other areas are less fortunately circumstanced, and it is to this latter group that attention must be directed and to which reference

¹ This *Year Book*, 27 (1950), pp. 261, 264.

² See Article 68, Geneva Civilians Convention of 1949.

is primarily made hereafter in speaking of spies, guerrillas, and other so-called 'unlawful belligerents'. The first genus to be considered will be the classic form of hostile activity in a guise which conceals the true character of the individual, namely, spies.

II. *Hostile conduct by persons not of the armed forces: Spies*

Over the course of years, much learned discussion has been expended on the question of the conformity of espionage in time of war with international law and with morality. From this consideration has emerged a virtual unanimity of opinion that while the morality of espionage may vary from case to case, some, and probably all, spies do not violate international law. A distinction may, of course, be made with respect to espionage other than in time of war, for such conduct is of doubtful compatibility with the requirements of law governing the peaceful intercourse of states.¹

The great international lawyers of the past approached espionage, as they did so many other questions, from the standpoints of both law and morals. They were ultimately persuaded by the common view of mankind that persons acting as spies from patriotic motives pursue a moral course of conduct and concluded that the power of a belligerent to punish espionage directed against him arose not from the fact that the law prohibited the activity but from the danger which clandestine acts created and the resulting necessity that they be dealt with severely.² How this view was to be reconciled with the safeguards generally accorded enemy soldiers is most persuasively stated in the words of Gentili:

'This also is a reason why you should be unwilling to assume that role [of spy], because it is denied the privileges attaching to military service. And therefore the law against spies seems just, since they have divested themselves of the character which would prevent their being treated in that cruel and degrading fashion.'³

At the Brussels Conference of 1874, thorough consideration was given to espionage in war, and the provisions there drafted⁴ were carried over, almost without change, into the Hague Regulations of 1899 and 1907.⁵ A number of states at the Conference strenuously resisted any suggestion that the proposed code should give legal sanction to an opposing belligerent's exercise of jurisdiction over a spy,⁶ and the resulting article provided by

¹ Huybrechts, 'Espionnage et la convention de la Haye', in *Revue de droit pénal et de criminologie*, 31 (1950-1), p. 931.

² Belli, *De Re Militari et Bello Tractatus* (1563), Part viii, ch. i, § 42; Grotius, *De Jure Belli ac Pacis* (1646 ed.), Book iii, ch. iv, xviii. 3; Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), ch. vii, §§ 884, 885, 893; Vattel, *Le Droit des gens* (1758), Book iii, ch. x, § 179.

³ *De Jure Belli Libri Tres* (1612), Book ii, ch. ix, pp. 282-3.

⁴ Articles 19-22, *Actes de la Conférence de Bruxelles* (1874), p. 291.

⁵ Articles 29-31.

⁶ The delegations which were most articulate about this matter were those of Belgium, the Netherlands, and Italy (see p. 324, n. 2). The *Projet* had provided: 'L'espion pris sur le fait, lors même que son intention n'aurait pas été définitivement accomplie ou n'aurait pas été couronnée de succès, est livré à la justice' (*Actes*, p. 13).

way of compromise that a spy was to be treated according to the laws in force in the capturing army.¹ A recommendation that a distinction be made between professional agents and volunteers motivated by patriotic fervour met with an unfavourable reception,² but the Conference found it impossible to agree whether military and civilian spies were in all respects to be treated in the same manner.³

Articles 29 and 30 of the Hague Regulations do not attempt to do more than define the spy and require that he shall not be punished without trial, and it is to be observed that they do not purport to make espionage a violation of the Regulations. A further modification was in fact made in the Brussels draft in order to avoid an implication that a spy is 'to be condemned by virtue of a declaration signed by his own Government'.⁴ Moreover, the sanctioning by Article 24 of the 'employment of measures necessary for obtaining information about the enemy' is strongly indicative that espionage falls into the same category as legitimate ruses of war.⁵ In accordance with these provisions, recent texts,⁶ military manuals,⁷ and judicial opinions⁸ have normally emphasized that espionage is not in violation of the law of nations but that a belligerent penalizes this conduct because of the danger it presents to him. Frequently military codes incorporate a definition of espionage, conforming to that of the Hague Regulations,⁹ and thereby provide a positive legal precept in domestic law to fill up the measure of jurisdiction which international law concedes to be held by the offended state for the protection of its national security. Into this firmly established law some doubt has been interjected by *Ex parte Quirin et Al.*,¹⁰ decided by

¹ Article 19, *Actes*, p. 291.

² The proposal was made by the Spanish delegate (*Actes*, pp. 42, 203).

³ The difficulty arose in connexion with the discussion of Article 21, dealing with the spy who had rejoined his army (*Actes*, pp. 44-45).

⁴ Proceedings of the Second Subcommission, Second Commission, in *The Proceedings of the Hague Peace Conferences; The Conference of 1899* (ed. by Scott, 1920), p. 489.

⁵ *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 36, n. 4; *Field Manual 27-10, Rules of Land Warfare* (1940), par. 203.

⁶ Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 329; Halleck, op. cit. (3rd Eng. ed. by Baker, 1893), vol. i, p. 571; Wheaton, *International Law*, vol. ii (7th Eng. ed. by Keith, 1944), p. 218; Westlake, *International Law*, Part ii (2nd ed., 1913), p. 90; Hall, *A Treatise on International Law* (7th ed. by Higgins), p. 579; Fauchille, *Traité de droit international public*, vol. ii (1921), p. 150; Calvo, *Le Droit international théorique et pratique* (5th ed., 1896), vol. iv, p. 178; Rolin, *Le Droit moderne de la guerre* (1920), vol. i, p. 366; Waltz, *Recht der Landkriegsführung* (1942), p. 54; but cf. Hyde, op. cit., vol. iii, p. 1865.

⁷ *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 36; *Field Manual 27-10, Rules of Land Warfare* (1940), par. 203; *Kriegsbrauch im Landkriege* (1902), p. 30.

⁸ *United States ex rel. Wessels v. McDonald, Commandant of Brooklyn Navy Yard* (E.D.N.Y., 1920), 265 Fed. 754, dismissed per stipulation (1921), 256 U.S. 705; *United States v. List et Al.* (1948), *Trials of War Criminals*, xi (1950), p. 1245; *War Crimes Reports*, viii (1949), p. 54; see *Opinions of the Attorneys General of the United States*, 31 (1920), p. 356, and 40 (1949), p. 561, concerning the jurisdiction of a United States military tribunal over one Witcke, alias Waberski, a German spy arrested in the vicinity of a military post.

⁹ France, *Code de Justice Militaire*, Articles 237, 238; United States, *Uniform Code of Military Justice*, Article 106 (64 Stat. 138; 50 U.S.C. 700).

¹⁰ 317 U.S. 1.

the Supreme Court of the United States in 1942. Spies were considered by the Court to be 'offenders against the law of war subject to trial and punishment by military tribunals' for the 'acts which render their belligerency unlawful'.¹ A possible inference from this language is that the Court considered espionage to be subject to punishment as an international crime.² There is reason to suppose, however, that the tribunal was led by the somewhat imprecise distinction often made between 'lawful' and 'unlawful' combatants to conclude that failure to qualify as a lawful combatant could be described as a violation of international law. If, indeed, the Court was proceeding on the assumption that the law of nations forbids the employment of spies and espionage itself, that view, it is submitted, fails to find support in contemporary doctrine regarding such activities in wartime.³

Article 31 of the Hague Regulations, which provides that a spy who is captured by the enemy after rejoining his army is to be treated as a prisoner of war and incurs no responsibility for his previous acts of espionage, throws considerable light on the juridical status of espionage. Two reasons have been adduced for this limitation in punishment.⁴ The first goes to the difficulty of proving the act after the individual has returned to his own army. To this it must be replied that if it is possible to gather and utilize proof of war crimes of the atrocity type years after the event took place, this explanation seems to lack substance. The other, which appears to be the correct reason, is that spying is a ruse of war, which the threat of 'punishment' is designed to deter. Once the act is completed, the deterrent purpose of the death penalty has no room for operation. The limitation of punishment thus offers a strong indication that espionage is not prohibited by the international law of war and that its suppression is instead left to the initiative of the opposing belligerent. Article 31 has been productive of some controversy concerning whether the immunity of the returned spy must be applied to the civilian secret agent as well as the military.⁵ References in the

¹ 317 U.S. 31.

² This is the view adopted by Professor Hyde in 'Aspects of the Saboteur Cases', in *American Journal of International Law*, 37 (1943), p. 88. In commending the 'bold and fresh view' (p. 90) taken by the Supreme Court, he points to the inconsistency between the recognition of the propriety of a state's employment of espionage and the punishment of the spy so employed and suggests that both the act of the state and the act of the individual are equally violative of international law. It would appear, on the contrary, that the appearing inconsistency may be realistically resolved only by an acknowledgement that the act of neither is in contravention of international law.

³ Although the opinion contains copious citations to Field Manual 27-10, *Rules of Land Warfare* (1940), it does not refer to paragraph 203 of the Manual, which states that spies are not punished as 'violators of the law of war'. With respect to espionage, the Court alluded to paragraph 83 of General Orders No. 100, 24 April 1863, but the General Orders, which had been superseded many years previously, stated elsewhere that deception in war is 'a just and necessary means of hostility' (par. 101).

⁴ Violle, *L'Espionnage militaire en temps de guerre* (1903), p. 160; Huybrechts, op. cit., pp. 937-8.

⁵ In *Re Flesche*, *Nederlandse Jurisprudentie*, 1949, No. 548, the Dutch Special Court of Cassation

article to a rejoining of the *army* and to subsequent treatment as a prisoner of war might seem, from a textual examination alone, to indicate that only a military spy was intended. However, the two possible bases for the limitation on the punishment of spies logically apply with equal force to both the military and civilian agent, and the great difficulty in many cases of establishing whether an individual acted in a military or non-military capacity at the time of his act¹ further suggests that the protection of Article 31 is not confined to the military spy.

Questions of substance concerning spies may also arise in connexion with the limitation of Article 29 of the Hague Regulations to spies taken in the 'zone of operations'. In modern warfare, in which even the remotest town is exposed to the danger of attack by guided missiles, rockets, and parachute troops, the entire territory of a belligerent may with some justice be said to be in a zone of operations.² But it is normal to preserve some semblance of distinction between that area and territory which is not subject to military control, if only to provide a line of demarcation between the jurisdiction of the military and civilian authorities.³ At the same time that military codes frequently contain a specific reference to the type of espionage defined in Article 29, the civil law also contains its own provisions for the protection of official secrets and for the general security of the state in time of war.⁴ It is even clearer, however, that espionage falling under this latter type of interdiction cannot be said to be in violation of the law of nations, since its punishment has hitherto been effected without reference to that body of law. An alien enemy engaging in espionage, although divesting himself of the protection he might otherwise enjoy as a prisoner of war, is in turn protected by the safeguards of domestic law, which, by way of securing the liberties of loyal citizens, makes even active enemies benefit from the law's protection. As the difficulty of distinguishing the traitor from the spy and secret agent increases, by reason of the fact that a given act may be treasonable if committed by a citizen and espionage if committed by an

held that Article 31 does not apply to civilians, and that the immunity therein provided is confined to military personnel in the zone of operations. On the other hand, the *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 38, n. 5, and Rolin, *op. cit.*, vol. i, p. 371, take the view that the immunity of the returned spy is a general one, applying to all persons of that character. Article 26 of the Manual prepared by the Institute of International Law extended the immunity to spies who had succeeded in quitting the territory occupied by the enemy (*Annuaire de l'Institut de droit international*, 5 (1881-2), p. 156).

For cases granting immunity to returned military spies see *In re Martin* (1865), 45 Barb. (N.Y.) 142; *In re Rieger* (France, Cass. crim., 29 July 1948), Dalloz, *Hebdomadaire*, 1949, 193, with a note by de Vabres, *Recueil Sirey*, 1950, 1. 37 (under date of 20 July 1948).

¹ Huybrechts, *op. cit.*, p. 941.

² *In re Rieger*, *supra*, recognized that even the unoccupied portion of France could be said to be in a zone of operations; see Waltzog, *op. cit.*, p. 52.

³ See *Ex parte Milligan* (1867), 4 Wall. 2.

⁴ E.g. Official Secrets Act, 1911 and 1920 (1 & 2 Geo. V, c. 28; 10 & 11 Geo. V, c. 75); United States Code, Title 18, Chapter 37.

alien,¹ the necessity of subjecting all persons outside the zone of operations to a common law and to a common tribunal grows correspondingly greater. Although problems of this nature have been productive of recommendations that espionage in time of war be the subject of an agreed international definition,² it has not been suggested that espionage should itself be interdicted by international law.

As long as espionage is regarded as a conventional weapon of war, being neither treacherous nor productive of unnecessary suffering, the sanctions visited on spies are only penalties to deter the use of that ruse. The actions of a spy are not an international crime, for by his conduct he merely establishes that he is a belligerent with no claim to any of the protected statuses which international law has created.

III. *Hostilities in arms by persons not of the armed forces: Guerrillas*

Hostilities in arms by persons not entitled to be treated as prisoners of war are of tremendously greater practical importance than espionage, but the law applicable to such conduct is, if anything, even less certain. These activities may take the form of individual acts of violence, in which case the expression *franc-tireur* is normally used, or may with greater probability be carried on by armed bands in guerrilla or partisan warfare. For want of a better term, the expression 'guerrilla warfare' will be applied to all such acts, but with the qualification that it is not intended to refer, in the sense in which it is used in military science, to the warfare waged by detached troops of the armed forces, properly so identified, or to armed forces which continue fighting after a surrender, which presents a problem of another nature.³ The word 'guerrilla' is most usefully applied in a legal context to armed hostilities by private persons or groups of persons who do not meet the qualifications established in Article 4 of the Geneva Prisoners of War Convention of 1949 or corresponding provisions of the earlier Conventions.⁴

The tendency of academic lawyers has been to charge guerrillas with acting in contravention of international law. It has been said that such armed bands carry on 'irregular war' because they are normally self-constituted, lack permanency, do not wear uniforms, carry on pillage and

¹ As in France; see *Code Pénal*, Articles 76 and 77; de Vabres, 'La Répression de l'espionnage et la codification du Droit pénal international', in *Revue de droit international, de sciences diplomatiques et politiques*, 26 (1948), p. 341; Pella, 'La Répression des crimes contre la personnalité de l'état', in *Recueil des cours de l'Académie de droit international de la Haye*, 33 (1930), p. 726.

² A suggestion of this nature was made by General Arnaudeau (France) at the Brussels Conference of 1874 (*Actes*, p. 43); see de Vabres, *op. cit.*, p. 350.

³ Concerning which see Nurick and Barrett, 'Legality of Guerrilla Forces under the Laws of War', in *American Journal of International Law*, 40 (1946), p. 563.

⁴ Article 1, Hague Regulations of 1907; Article 1, Geneva Prisoners of War Convention of 1929.

destruction, and are disposed to take few prisoners and to deny quarter.¹ The principal accusation which has been made against them is that they eventually degenerate into bandits, engaging in murder and robbery in hope of gain. As a consequence, the texts of the nineteenth and twentieth centuries are disposed to stigmatize guerrilla warfare and any private hostilities in arms as 'war crimes'.²

How well this characterization accords with the realities of modern warfare is open to serious question. It must be assumed at the outset that guerrilla activities are an inevitable concomitant of hostilities waged by regularly constituted armed forces.³ Isolated bodies of regular troops, greatly extended supply lines, and thinly scattered occupation forces offer inviting and advantageous targets to guerrilla columns. By contrast with the armed forces, guerrillas require little logistical support. Their casualties are slight. Above all they have the advantages conferred by the fact that they conceal their character as belligerents and are thus able to exploit to the full the element of surprise.⁴

Strategic and tactical considerations alone do not recruit guerrilla forces, and it must be remembered that the partisan exists in modern warfare because the civilian willingly takes up arms and fights. The guerrilla fighting of today had its forerunners in the resistance of the Spanish Maquis during the Peninsular Campaign⁵ and in the hostilities of French civilians in the Franco-Prussian War, which brought the term *franc-tireur* into an undeserved prominence.⁶ Resistance activities were an important instrument in the defeat of the Axis during the Second World War, and it is hardly possible to name an armed conflict which has taken place since the conclusion of those hostilities in which guerrillas have not played an important and often decisive role.⁷ Only a rigid legal formalism could lead to the characterization of the resistance conducted against Germany, Italy, and

¹ Hyde, op. cit., vol. iii, p. 1797; Hyde's sentiments are those of Lieber in *Guerrilla Parties considered with Reference to the Laws and Usages of War* (1862), p. 7.

² Oppenheim, op. cit., vol. ii (6th ed. by Lauterpacht, 1944), pp. 451, 454; Fauchille, op. cit., vol. ii, pp. 99 ff.; Hyde, op. cit., vol. iii, pp. 1797-8; Halleck, op. cit., p. 386; Spaight, op. cit., p. 63; Waltz, op. cit., p. 16; see to like effect the British *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 83, characterizing private hostilities in arms as illegitimate acts 'from the enemy's standpoint', and United States *Rules of Land Warfare* (1940), pars. 348, 351, and 352.

³ A related problem is that of the use of force by members of civil defence organizations who have not been equipped with uniforms or have not had an opportunity to don them (see *United States v. Hangob* (1945), *War Crimes Reports*, xiv (1949), p. 86).

⁴ Miksche, *Secret Forces; The Technique of Underground Movements* (1950).

⁵ Napier, *History of the War in the Peninsula* (1828-40).

⁶ See Rolin-Jaequemyns, 'Chronique du droit international; Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international', in *Revue de droit international et de la législation comparée*, 3 (1871), p. 288.

⁷ United Nations forces in Korea have, for example, encountered guerrilla bands ranging in size from 50 to 2,000 men (*Eighth Report of the United Nations Command Operations in Korea, for the period 16 to 30 October 1950*, U.N.Doc. S/1885).

Japan as a violation of international law. Patriotism, nationalism, allegiance to some sort of political authority have replaced the desire for loot, which has traditionally been attributed to the guerrilla, in motivating civilians to take an active part in warfare. And finally, it must not be forgotten that in the Marxist view of the 'people's war', to which a considerable number of important military powers subscribe, popular resistance, including guerrilla warfare, is regarded as a necessary and proper means of defence.¹

The law of war has had to evolve an uneasy and sometimes unworkable compromise between the legitimate defence of regular belligerent forces and the demands of patriotism. An unwillingness to regard guerrillas as internationally criminal may be discerned at the very threshold of the modern law of war, for the delegations at the Brussels Conference from those countries which had the most often been invaded insisted again and again on the right of the attacked country to call its citizens to arms to resist the enemy.² The protected position afforded the members of the *levée en masse*³ is a monument to these sentiments, but the spontaneous mass uprising in the face of the enemy has lost any real significance. The *levée en masse* is actually an anomaly in the law, for its recognition poses threats not only to the country employing it but to the enemy as well. In an area where a levy exists, the enemy is not without basis in looking upon all inhabitants of the invaded area who are capable of bearing arms as potential enemies to be attacked or, if they surrender, to be made prisoners of war.⁴ The very considerations which militate against treating all belligerents as prisoners of war apply with equal force to the members of the *levée en masse*.

The distinction between those forces entitled to be treated as prisoners of war upon capture and those not so qualified which had been worked out at Brussels was preserved in the Hague Regulations of 1899 and 1907.⁵ Martens, the president of the 1899 Conference, drew attention to the fact that:

¹ Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *American Journal of International Law*, 40 (1946), p. 534; Kulski, 'Some Soviet Comments on International Law', in *American Journal of International Law*, 45 (1951), p. 347.

² The Spanish delegation asserted that defensive war was for Spain a national war to which all the forces of the nation would be directed, regardless of the danger incurred (*Actes de la Conférence de Bruxelles* (1874), pp. 138-9). A member of the Italian delegation expressed the view that the Conference did not wish to indicate that resistance, other than in the form of the *levée en masse*, would be illegitimate (*Actes*, pp. 244-5). General de Leer of Russia expressed his Government's understanding that an attacked state has a right of defence without restriction, so long as it conforms to the law of war (*Actes*, p. 246).

³ Article 10 of the Brussels Code; Article 2, Hague Regulations of 1907.

⁴ *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 11.

⁵ A proposed Article recognizing the right of the population of invaded territory to offer 'by all lawful means, the most energetic patriotic resistance against the invaders' was, however, not favourably received (Minutes of the Second Subcommission, Second Commission, Conference of 1899, Eleventh Meeting, 20 June 1899, in *The Proceedings of the Hague Peace Conferences; The Conference of 1899* (ed. by Scott, 1920), pp. 550-5).

'The Brussels Conference, therefore, by no means intended to abolish the right of defence, or to create a code which would abolish this right. It was, on the contrary, imbued with the idea that heroes are not created by codes, but that the only code that heroes have is their self-abnegation, their will and their patriotism.

'The Conference understood that its duty was not to try to formulate a code of cases which cannot be foreseen or codified, such as acts of heroism on the part of populations rising against the enemy.

'It simply wished to afford the populations more guaranties than had existed up to that time.'¹

He went on to assert that the provisions drafted at the Brussels Conference had not been designed to deal with all cases and that they left the door open to 'the heroic sacrifices which nations might be ready to make in their defence'. 'It is not our province', he added, 'to set limits to patriotism.'

It was not, however, until the conclusion of the Second World War that judicial consideration was given to the status of persons falling outside the class of so-called 'lawful belligerents'. In the *Hostages Trial*,² guerrillas were actually said, in legal intendment, to resemble spies in that the enemy punished such activities not because of their illegality in an international sense but because of the danger they presented to him. The prevailing view in the trials involving resistance in arms, whether in occupied or other than occupied territory,³ appears to be in conformity with that expressed in the *Hostages* case. It was also made plain that guerrillas, like spies, may not be punished without trial.⁴

The Geneva Conference of 1949 was well aware of the problem implicit in the existence of guerrilla and partisan warfare and seemed to be under the impression that it had dealt with it in satisfactory fashion.⁵ Members of resistance movements who comply with the conditions that they be commanded by a responsible person, wear a fixed distinctive sign, carry arms openly, and comply with the laws of war are, even in occupied areas, entitled to be treated as prisoners of war upon capture.⁶ But because guerrilla warfare is in essence secret warfare, it is improbable that the majority of guerrillas will comply with these conditions, particularly those

¹ Minutes of the Second Subcommission, Second Commission, Conference of 1899, Eleventh Meeting, 20 June 1899, in *The Proceedings of the Hague Peace Conferences; The Conference of 1899* (ed. by Scott, 1920), p. 547.

² *United States v. List et Al.* (1948), *Trials of War Criminals*, xi (1950), p. 1245; *War Crimes Reports*, viii (1949), p. 58.

³ *United States v. Ohlendorf et Al.* (1948), *Trials of War Criminals*, iv (1949), p. 492.

⁴ *United States v. List et Al.* (1948), *Trials of War Criminals*, xi (1950), p. 1290; *United States v. Von Leeb et Al.* (1948), *ibid.*, p. 530; *War Crimes Reports*, xii (1949), p. 86; see the closing Address for the Prosecution in *United States v. Yamashita* (1945), *ibid.* iv (1948), p. 31. Article 5 of the Geneva Prisoners of War Convention of 1949 recognizes the necessity of a trial by providing that persons who have committed belligerent acts are to be protected by that Convention 'until such time as their status has been determined by a competent tribunal'.

⁵ See Report of Committee II to the Plenary Assembly (CDG/PLEN. 76 Pris, 23 July 1949), p. 7.

⁶ Article 4.

which relate to the wearing of distinctive insignia and the open carrying of arms.¹ If this is so, the problem of the guerrilla fighter is still one of customary international law. The fact that such persons are still left, subject to the procedural and general safeguards afforded by the Geneva Conventions of 1949, to the mercy of the enemy will in strict law lead to the extreme penalty of death. It may be expected, however, that more favourable treatment, specifically in the form of recognition as prisoners of war, will be held out as an inducement to persuade guerrillas to surrender. The listing of those persons who are entitled as a matter of law to be treated as prisoners cannot reasonably be construed as prohibiting a belligerent from granting that status to persons having no legal right thereto.²

When resistance activities in the form of guerrilla warfare are carried out in occupied areas, it would appear, in the light of prosecutions for war crimes and the Geneva Conventions of 1949, that they constitute no violation of any duty imposed by international law and cannot therefore be stigmatized as violative of international law.³ As guerrilla activities in occupied areas during the Second World War proved to be of considerably greater consequence than those in the face of the enemy, there is reason to suppose that the law applicable to unoccupied areas should correspond to that to be invoked elsewhere, unless some distinction between the two which is of legal significance may be ascertained. But if such warfare within occupied areas, where the power of the enemy is already established, is not in contravention of the law of nations, how much less can similar activities in unoccupied zones, where the fortunes of battle are still in doubt, be said to have that character. Nor can it be argued that a state has no obligation to suppress guerrilla activities on its behalf in that portion of its territory which is occupied but that such a duty does arise where active hostilities are in progress in the face of the enemy. As long as partisan warfare is inspired by genuine allegiance rather than a desire for pillage and as long as guerrilla activities are looked upon as licit and laudable by the state on whose behalf they are undertaken and by third parties to the conflict, it is highly unreal to regard them as internationally criminal.⁴

¹ The fear of Strebel that what he characterizes as a legitimization of resistance activities by civilians, particularly those in occupied territory, will put major obstacles in the path of the opposing belligerent (*loc. cit.*, pp. 133 ff.) apparently proceeds from the assumption that large numbers of persons will be affected by those provisions of Article 4 of the Prisoners of War Convention of 1949 pertaining to resistance movements. It is believed that the disputed clauses of Article 4 represent only a slight derogation from the international common law of war and that the problem of guerrillas who are not entitled to be treated as lawful belligerents is still paramount. See also Brandweiner, 'Das Partisanenproblem und die Genfer Konventionen vom 12. August 1949', in *Juristische Blätter*, 72 (1950), p. 261.

² This was the view taken by the Danish delegate at the Geneva Conference of 1949 (*Verbatim Report of the Thirteenth Plenary Meeting*, 26 July 1949, CDG/PLEN/CR 13, p. 6).

³ This *Year Book*, 27 (1950), pp. 253 ff.

⁴ The assimilation of guerrillas to 'bandits' and 'pirates', as proposed by Cowles ('Universality of Jurisdiction over War Crimes', in *California Law Review*, 33 (1945), pp. 181-203), is

Although guerrilla warfare and private hostilities in arms should not be regarded as violative of international law, this does not necessarily mean that persons carrying on such activities may not be guilty of war crimes in their strict sense. To apply the doctrine of membership in criminal organizations¹ to membership in any guerrilla band because of fears concerning their lawlessness would, of course, constitute an unwarranted extension of the principle, by a legislative rather than a judicial process, from individual organizations within a state to all groups of a specified type. The notion of complicity² may, however, involve the responsibility of persons associated with an individual organization of guerrillas members of which have committed criminal acts. Should members of such groups pillage, loot the dead and wounded in the area of battle, refuse to give quarter, or murder prisoners, they would, like members of the regular armed forces, be similarly accountable for their criminal acts.³

The guerrilla thus appears, like the spy, to be a belligerent who has failed to meet the conditions established by law for favoured treatment upon capture. The judicial proceeding to which a suspect is subjected is accordingly a determination whether or not he meets the qualifications prescribed for treatment as a prisoner of war or as a peaceful civilian. What formulation of law is necessary to permit his 'punishment' if he fails so to qualify is essentially a matter of domestic law or practice. In Germany, guerrilla warfare against the Reich was defined as a crime by German law.⁴ In other countries a purported prosecution for acting in 'violation of the laws and customs of war' is probably to be construed as directed against an offence in violation of the military common law of the state concerned.⁴ In any case, the protection of international law, in the sense in which that law safeguards prisoners of war and peaceful civilians, terminates when the judicial proceeding reveals that the individual does not qualify for protected status.

IV. *Other forms of hostile activity by persons not of the armed forces*

Clandestine activities in warfare are not confined to the work of the spy, the armed guerrilla, and the *franc-tireur*. Sabotage, intelligence activities

unwarranted. Although some guerrillas may engage in banditry and thereby become guilty of the war crimes of murder, plunder, and wanton destruction, it is somewhat naïve to suppose that a desire for blood and booty for their own sakes is the sole well-spring of such warfare and that guerrillas never devote themselves to the same missions as the regular armed forces.

¹ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (Cmd. 6964, H.M.S.O., 1946), pp. 66 ff.

² Article 2 (12) (iv), Draft Code of Offences Against the Peace and Security of Mankind, in *Report of the International Law Commission Covering its Third Session*, 16 May–27 July 1951 (U.N.Doc. A/CN. 4/48, 30 July 1951), par. 59.

³ I.e. as 'marauders' or 'bandits' in the true sense of those words (see *United States Rules of Land Warfare* (1940), par. 353).

⁴ Verordnung über das Sonderstrafrecht im Kriege und bei Besonderem Einsatz (Kriegs-sonderstrafrechtsverordnung), 17 August 1938, *R.G.Bl.*, 1939, I, 1455, Article 3.

other than espionage, propaganda, and psychological warfare may also be carried on by civilians or disguised military personnel, and their importance, by comparison with hostilities in arms, has become so great that partisan warfare has been given the name of 'sabotage with violence'.¹ Since guerrilla bands will depend upon these means of harming the enemy as well as on open combat, guerrilla warfare itself must be understood as embracing this wide range of activities. Such partisan warfare is usually carried on by civilians, as soldiers of the regular armed forces other than those detailed to organize and assist underground warfare derive no advantage in normal circumstances from assuming the garb of civilians. But military personnel will frequently be called upon to serve as secret agents and to perform clandestine functions not calling for the use of armed force. Both they and their counterparts in resistance movements will of necessity disguise themselves or keep in hiding in a manner resembling the clandestine activities of the spy.

To the hostile activities, other than open armed warfare, of those not qualified to be treated as prisoners of war, the term 'war treason' is most frequently applied. If that term, which is highly objectionable as a concept of occupation law,² is extended to hostile activities wherever conducted,³ its use becomes even more difficult to justify. As to the enemy carrying on military operations in other than occupied territory, sabotage behind the lines is not treasonable in an international sense, because no juridical relationship exists between the offending combatant and the state affected. All the inconsistencies inherent in 'war treason' in occupied areas are thus only multiplied if that term is applied to hostile conduct elsewhere. Alternatively, persons carrying on secret warfare have been accused of the offence of 'unlawful combatancy', which the Supreme Court of the United States in *Ex parte Quirin*⁴ declared to be violative of international law and presumably on that account a 'war crime'. In that case, eight Germans who had landed secretly in the United States and were bent on a mission of sabotage were held to be within the jurisdiction of a military commission, before which they had been tried on charges which included, *inter alia*, violation of the law of war in the form of 'unlawful belligerency'. The Court distinguished the lawful and unlawful combatant in the following terms:

'Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'⁵

The unlawfulness of their conduct was based on the fact that they had

¹ Miksche, *op. cit.*, p. 142.

² *This Year Book*, 27 (1950), pp. 251-2.

³ *Manual of Military Law* (1929), Amendments No. 12 (1936), pp. 37, 83; *Field Manual* 27-10, *Rules of Land Warfare* (1940), par. 205; Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 454.

⁴ (1942), 317 U.S. 1.

⁵ 317 U.S. 31.

clandestinely entered the United States on a hostile mission, 'discarding their uniforms upon entry'. While there is no doubt that secret agents of this nature are subject to trial under the statutes or military common law of the captor, the characterization of such conduct as a violation of international law arises, it is submitted, from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection. The German saboteurs were also charged with offences under the United States Articles of War, namely, those defining espionage and aiding the enemy,¹ and it would appear that these provisions of municipal law afforded a surer ground for their punishment than did the offence of 'unlawful belligerency' under international law, to which the Court primarily directed its attention.

It is uncontroverted that a person accused of hostile conduct other than as a member of those forces which are entitled to treatment as prisoners of war must be granted a trial. For the most part, the tribunal would appear to be charged only with the responsibility of determining whether the accused is to be treated as a prisoner of war, as a peaceful and therefore necessarily innocent civilian, or as neither, in which case he may be penalized. Once it has been discovered that the accused is not entitled to treatment as a prisoner of war, there appears in most circumstances to be no reason in law to inquire whether the individual is a civilian or a disguised soldier, for it would appear in the latter case that the soldier, even in occupied territory, is to be regarded as having thrown in his lot with the civilian population and to be subject to the same rights and disabilities. The question of his actual status may, however, be relevant to the penalty to be imposed, since the greater danger presented by the presence of disguised military personnel within or behind the lines may call for a proportionately greater punishment than is meted out to an offending civilian. Special problems are presented only in the case of military personnel seeking to avoid capture and escaped prisoners of war who are captured or recaptured in civilian clothes. The evader, as he is called, is often a member of an air force who has parachuted into territory held by the enemy and has disguised himself in an attempt to escape capture.² If he is taken by the enemy, the military tribunal determining his status may with some justification think him to be a spy, and the burden may be upon him to rebut that inference if it is once established that he is in the military service.³ Dr. Spaight believes that the simple evader who is not a spy should be treated as a prisoner of war.⁴

¹ Articles of War 82 and 81, then in effect.

² Secret activities to facilitate such escapes were carried on extensively during the Second World War (Hinton, *Air Victory: The Men and the Machines* (1948), p. 325); see *In re Schonfeld et Al.* (British Military Court, Essen, 1946), *War Crimes Reports*, xi (1949), p. 64.

³ *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 37.

⁴ Spaight, *Air Power and War Rights* (3rd ed., 1947), pp. 102-4.

The prisoner of war who escapes will normally attempt to assume protective colouring and thus escape being retaken. It is recognized that prisoners of war have a duty under their own law to escape,¹ and this obligation has been taken into account in placing severe limits on the punishment which may be meted out to a recaptured prisoner who, by the fact of escape, does not remove himself from prisoner-of-war status.² Why the evader and the escaping prisoner should benefit from a more favourable régime than their brethren bent on hostile missions within the enemy's lines can probably be explained only by the fact that their conduct in seeking to escape is not regarded as hostile. When, however—as happened in a number of commando and parachute raids—military personnel wear civilian clothes under their uniforms in order that they may assume the guise of civilians when their immediate mission is accomplished, their status is not easily ascertainable.³ It would seem consistent with the law applicable to ruses and disguised belligerents that such individuals taken while still in uniform should be treated as prisoners of war on the ground that they have only prepared but have not yet executed their deceptive measures. If they should later be captured in civilian clothes, they would appear to be entitled to no better and no worse treatment than falls to the lot of the civilian guerrilla.

Belligerents, both civilian and military, may also assume as disguise the uniform of the enemy. Some authorities regard this as a legitimate ruse before battle,⁴ while others contend that the use of the enemy uniform should be absolutely forbidden in all circumstances,⁵ save perhaps that of espionage. The view that such deception is permissible if not done in battle is to some extent supported by the outcome of the *Skorzeny* case,⁶ which resulted in the acquittal of a number of Germans who had sought to deceive United States forces by the use of American uniforms and equipment. Although such conduct may thus not be a war crime, there is room for the view that individuals so disguising their true character are not entitled to be considered as prisoners of war and are to be treated as if they had been taken in civilian clothes. The fact that hostilities had ceased at the

¹ *In re Amberger* (British Military Court, Wuppertal, 1946), *War Crimes Reports*, i (1947), p. 81.

² Articles 91–94, Geneva Prisoners of War Convention of 1949.

³ This question is raised in the annotation (p. 28) to *In re Von Falkenhorst* (British Military Court, Brunswick, 1946), *War Crimes Reports*, xi (1949), p. 18. Spaight states that the outer military garb of such persons might not serve to regularize their position (*Air Power and War Rights* (3rd ed., 1947), p. 314).

⁴ Hall, *op. cit.* (8th ed. by Higgins, 1924), p. 649; Westlake, *op. cit.*, Part ii (1907), p. 73; Fauchille, *op. cit.*, vol. ii, p. 127. The question is essentially, of course, what use of the enemy uniform constitutes 'improper use . . . of the military insignia and uniform of the enemy' within the meaning of Article 23 (f) of the Hague Regulations of 1907.

⁵ Spaight, *War Rights on Land* (1911), pp. 106–110 (characterizing a rule which envisages a quick change of uniforms on the battlefield as 'stupid'); Jobst, 'Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?', in *American Journal of International Law*, 35 (1941), p. 435, wherein the whole question is comprehensively discussed.

⁶ *United States v. Skorzeny et Al.* (1947), *War Crimes Reports*, ix (1949), p. 90.

time of the *Skorzeny Trial* may account for the failure of the American authorities to treat these persons in the same way as disguised persons taken in combat. The use of the Red Cross insignia as a means of deception is, of course, absolutely forbidden by the law of war and is a form of ruse punishable as a war crime.¹ With the question of such ruses, the point is reached at which the bearing of war on dissimulation may pass over from a denial of privilege under the law to active prosecution for the violation of the law of war.

V. Conclusions

The various types of hostile conduct which have just been described, although outwardly dissimilar, actually share a common characteristic—that of disregard for or deliberate non-compliance with the qualifications established for an individual's recognition as a prisoner of war upon capture. In a sense all of them also constitute ruses of one sort or another, if by ruse is understood any means of deceiving the enemy. Since these qualities are those which most conspicuously inhere in espionage, resistance activities in occupied areas, guerrilla warfare, and private hostilities in arms, they afford grounds for believing that all these acts of warfare, whether or not involving the use of arms and whether performed by military persons or by civilians, are governed by a single legal principle. That this larger category of hostile conduct is not violative of any positive prohibition of international law is demonstrable by much the same considerations as militate against an internationally imposed duty of obedience to the belligerent occupant. In both occupied and unoccupied areas, resistance activities, guerrilla warfare, and sabotage by private persons may be expected to continue on at least as widespread a basis in future warfare as they have in the past. More often than not, patriotism or some sort of political allegiance lies at the root of such activities. Consequently the law of nations has not ventured to require of states that they prevent the belligerent activities of their citizenry or that they refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished. Evidence of the unwillingness of international law to intervene in such matters is found in the failure of those who have compiled lists of 'war crimes' for which persons are actually to be tried to include such acts as espionage or guerrilla fighting. The weight of precedent and history represented by the law applicable to espionage and the importance for practical purposes of the law relating to the hostile conduct of occupied populations together suggest that the supposed illegality of those other types of secret warfare which have been mentioned is based upon a mis-

¹ *United States v. Hagendorf* (1946), *War Crimes Reports*, xiii (1949), p. 146.

conception. The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. 'Unlawful belligerency' is actually 'unprivileged belligerency'.

International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponent. The peril to the enemy inherent in attempts to obtain secret information or to sabotage his facilities and in attacks by persons whom he often cannot distinguish from the peaceful population is sufficient to require the recognition of wide retaliatory powers. As a rough-and-ready way of distinguishing open warfare and dangerous dissimulation, the character of the clothing worn by the accused has assumed major importance. The soldier in uniform or the member of the volunteer corps with his distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection. An exception must, of course, be made of the *levée en masse*, which cannot be reconciled on principle with the distinction otherwise made between privileged and unprivileged belligerents. There is considerable justice in the contention that to make the difference between life and death hang on the type of clothes worn by the individual is to create a 'clothes philosophy' of a particularly dangerous character. Indeed, the emphasis on the properly uniformed belligerent may be only a survival from the type of war fought by closely grouped ranks of soldiers, in which firing upon even individual detached soldiers was regarded as violative of international law.¹ As the current tendency of the law of war appears to be to extend the protection of prisoner-of-war status to an ever-increasing group, it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status.

The judicial determination which is necessary before a person may be treated as an unprivileged belligerent is in consequence not a determination

¹ Article 69, General Orders No. 100, 24 April 1863, prepared by Dr. Francis Lieber for the government of United States forces in the field, stated: 'Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.' It is perhaps this distaste for the killing of the detached soldier which accounts for the prohibition of assassination in customary international law. Although this rule is considered to have been incorporated into Article 23 (b) of the Hague Regulations, which forbids treacherous killing (Field Manual 27-10, *Rules of Land Warfare* (1940), par. 31), practice must be considered to have given a restrictive interpretation to 'assassination', at least to the extent of not rendering internationally criminal the deliberate killing of individual enemies in battle or in occupied areas. It is, for example, questionable whether the killing of Heydrich in 1942 by three Czech nationals who had parachuted into Czechoslovakia (see Spaight, *Air Power and War Rights* (3rd ed., 1947), p. 305) could be said to be an international crime. But cf. *Opinions of the Attorneys General of the United States*, 11 (1869), p. 297, dealing with the assassination of President Lincoln.

of guilt but of status only and, for the purposes of international law, it is sufficient to ascertain whether the conduct of the individual has been such as to deny him the status of the prisoner or of the peaceful civilian. There is actually no need for the creation of separate categories of offences, since the person bent on espionage will be subject to the same maximum penalty as the individual who transmits information innocently acquired or who engages in secret warfare. The fact that a given individual will, as a matter of practice, carry on a variety of forms of hostile conduct is a further reason why international law need not work out any code of 'offences'. What is thereafter to be done to the individual who is found to lack a privileged status is left to the discretion of the belligerent. It may either, as a belligerent act, cause the execution of the offender or it may require the application of domestic law to determine something denominated in that municipal law as 'guilt'—but a guilt only in the sense of municipal law. In the case of occupied territory Articles 64, 65, and 67 of the Geneva Civilians Convention of 1949 impose a positive requirement that persons in occupied areas be tried only under a municipal law enacted for or applied to the occupied area, and the Convention as a whole so severely restricts the power of the occupant to deal freely with unprivileged belligerency¹ that the resistance worker or guerrilla in occupied territory is actually in a more favourable position than if he had been arrested or captured elsewhere.

A denial that unprivileged belligerency is a violation of international law does not, it must be emphasized, leave the opposing state powerless. Guerrilla warfare may still be met with open warfare and saboteurs and spies captured within the lines may still be penalized, but not for any violation of international law. Except to the extent to which the power to impose the death penalty has been removed by the Geneva Civilians Convention of 1949,² the offended state may employ that measure in dealing with clandestine hostile conduct. Moreover, the capturing state is not precluded from punishing an unprivileged belligerent for a war crime *stricti juris*, if he has, for example, killed civilians, or pillaged or refused to give quarter. Although it may be foreseen that in time of war bandits who live by pillage may attempt to contend that they are guerrillas fighting for the defence of their country, the degree to which they comply with the law of war generally applicable to the armed forces will afford the best indication of their purpose, and particularly of their adhesion to one of the belligerents in the conflict rather than to motives of private gain.

As has already been observed, 'unprivileged belligerency' partakes strongly of the nature of a ruse by reason of its clandestine character. The

¹ See Gutteridge, 'The Protection of Civilians in Occupied Territory', in *Year Book of World Affairs* (1951), p. 290.

² Article 68.

same 'statute of limitations' which forbids the punishment by the enemy of a spy who has returned to his own lines accordingly could be applied to other forms of unprivileged belligerency, and there would appear to be strong reasons of policy for doing so.¹ However, although it is easy to determine that a spy's mission is completed with his return to his own lines, to fix with certainty when the status of 'unprivileged belligerency' in other forms is at an end is extremely difficult. Nevertheless, the principle to be applied would appear to be that if an individual has either returned to his own lines or become part of the regular armed forces or has otherwise indicated the termination of his belligerent status, as by long abstention therefrom, he may not be prosecuted by the opposing state for his previous acts of unprivileged belligerency. In the case of guerrilla warfare or of resistance activities in occupied territory, the cessation of belligerent activity will in all probability be difficult to prove in practice. Furthermore, as the penalizing of the unprivileged belligerent is actually a belligerent act, there is no reason for such action after the definite cessation of hostilities, subject to the exception that new acts occurring thereafter would be punishable on the basis that they had constituted a resumption of hostilities.

¹ It was at one time suggested that the war traitor who had returned to his own lines should benefit from the immunity extended to the spy (Article 104, General Orders No. 100, 24 April 1863), but the contrary view now appears to prevail (*Manual of Military Law* (1929), Amendments No. 12 (1936), p. 38; Field Manual 27-10, *Rules of Land Warfare* (1940), par. 213).

NOTES

PROFESSOR CHARLES CHENEY HYDE

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PROFESSOR CHARLES CHENEY HYDE, retired Professor of Columbia University, was born in Chicago in 1873 and died on 13 February 1952. He came of typically English stock on both sides and was proud to claim descent from three of the *Mayflower* pilgrims. His father, James Nevins Hyde, was a distinguished dermatologist and his mother bore a name—Griswold—not unknown to British students of American case-law. In 1895 he graduated B.A. at Yale and in 1898 M.A. at Yale and LL.B. at Harvard. He became a member of the bar of the State of Illinois in 1899 and began to practise 'on his own' in 1900. In 1901 he began teaching International Law—gratuitously at first—in North-Western University and continued to do so for some years. In 1906 he married Mary Paige Tilton, and in the winter of 1907–8 he taught International Law at Yale as deputy for Professor Theodore Woolsey. In 1916 he moved to Washington and devoted much of his time to his great book, the conception of which he had formed in 1905. In 1922 the book was published: *International Law Chiefly as Interpreted and Applied by the United States*, two volumes, containing a total of more than 1,700 pages. A second edition—in three volumes—appeared in 1945, and he was working on a supplementary volume at the time of his death. He contributed many articles to legal periodicals and in 1929 he published a biography of Charles Evans Hughes as Secretary of State. In 1923 he was appointed Legal Adviser to the State Department by President Harding, a post which he held for about two years. In 1925 he became Hamilton Fish Professor of International Law at Columbia University and held this chair until he became *emeritus* in 1945. He was President of the American Society of International Law for three years, and he was a Member of the Institut de Droit international. Throughout his whole working life (except when in the State Department) and indeed until the day before his death, he was engaged in writing professional opinions upon questions of International Law (including at least two important boundary disputes) and advising foreign governments in the conduct of arbitrations. This combination of academic life with practice marked his whole outlook and everything that he wrote.

If I may now turn to the mark that he has left upon International Law, I must refer first to the core of his work, which was his teaching from 1925 to 1945. 'Taught law is tough law', as Maitland remarked, and there can be no doubt that during that period Hyde made a deep impression upon hundreds of students who later became teachers and practitioners. He was intensely positivist in his outlook. For him the law was evidenced by the decisions of tribunals, national and international, and by the practice of governments, not least that of his own government. We must remember that the amount of the material of International Law which passes through the American courts, both Federal and State, far exceeds anything comparable in Great Britain. Hyde's mind was essentially practical, not speculative. The monistic and dualistic theories of International Law in relation to Municipal Law would leave him quite cold. A by-product of his positivism was his belief that one of the most hopeful lines of advance was to ascertain and publish in suitable form the views of different governments, as evidenced by their practice, upon the whole range of International Law, such as we have in Moore's and Hackworth's *Digests of International Law*, and in Hyde's own book. His view was that publications of this character would in the long run tend

to produce common agreement amongst states upon the main principles of the law rather than merely underline differences of view. It was with the idea of making a start on these lines that in or about the year 1931 he (and his colleagues at Columbia) prepared a Plan of Research (beginning with the law of Treaties) designed to be carried out in different countries by writers who were not to be in any sense official but merely to possess such amount of confidence with their governments as would permit access to their modern archives and current papers. Unfortunately the Second World War came before much was published.

With Hyde accuracy was not merely a habit but a virtue and a passion. In writing he felt that he was on oath. I have often found some of his sentences difficult and requiring careful study, for the reason that they have been the subject of prolonged consideration and repeated amendment, but he was incapable of writing anything loose or slovenly. I know from personal observation that in preparing the second edition of his book he would keep pages under examination for months and years and continually reconsider them with a view to greater accuracy and a nearer approach to perfection.

It is difficult for one whose contact with him was bound to be only occasional to assess the value of his work in the way that a colleague could do, but I believe that I am summing up the opinion of international lawyers in my own country when I say that at the time of his death he was regarded as the leader amongst American international lawyers, particularly on the strictly legal side; that his influence upon the literature of the subject—at any rate in all English-speaking countries—was profound; and that his practical and realistic approach and his very high standard of truth and accuracy greatly raised the respect accorded to International Law by lawyers, both practising and academic, who are not specialists in that branch of the law.

It is natural that in writing for the *Year Book* I should place the lawyer before the man. But, great lawyer as he was, that is not the order in which those who had the good fortune to be his friends will think of him. He was a man of complete integrity, moral and intellectual. For instance, I remember that throughout the period of Prohibition—and he had ceased to be in the government service some years before it came to an end—he took a strict view on the subject of prohibited liquor and refused to let it enter his house. He said that he could not regard it as consistent with having been an officer of the State Department to have anything to do with it. He had a warm heart and was generous in his judgment of others. He was at his very best in his home, and I am not likely to forget a week that I spent with him and Mrs. Hyde at Prout's Neck, near Portland, Maine. He was full of fun, a good raconteur with a rich repertory, fond of music and no inconsiderable performer on the violin, keen on chess, a charming host and companion, a good cook, and a great traveller, and he fancied himself as a designer of women's dresses and hats. He was in many respects old-fashioned; for instance, his acquaintance with air transport or television was just nil; but he was fond of young people and very popular with them. He was terribly deaf but he never appeared to allow that to depress him; he went straight on and allowed his imagination to fill up the gaps. The period that followed the death of his wife, to whom he was devoted, was an anxious one for his children, but his courage enabled him to make a new life for himself; his zest in life returned and he worked hard and happily until the night that he died unexpectedly in his sleep.

He crossed the Atlantic fourteen times and he had many friends and admirers in England and on the Continent, who will for ever retain a vivid and grateful impression of his personality.

THE PROTECTION OF FREEDOM OF ASSOCIATION BY THE INTERNATIONAL LABOUR ORGANIZATION

THE promotion of freedom of association has been a leading object of the International Labour Organization since 1919. The Organization has sought to promote this object in varied ways. The participation of employers' and workers' representatives in the International Labour Conference, the Governing Body, and other I.L.O. meetings has given a marked stimulus to the development of both employers' and workers' organizations in many countries. A series of international meetings has spelled out the implications of freedom of association in resolutions which have had a substantial effect on policy. More recently conventions on the subject have been adopted by the International Labour Conference and are now in process of ratification, and a special procedure for the examination of allegations concerning the infringement of trade union rights has been established by agreement between the I.L.O. and the Economic and Social Council of the United Nations. A brief survey of some of these developments may be of interest.

The Mandate of the I.L.O.

The recognition of the principle of freedom of association is one of the objects set forth in the original Preamble to the Constitution of the Organization, and among the principles set forth in Article 41 of the Constitution in its original form (Article 427 of the Treaty of Versailles) as being of special and urgent importance was 'the right of association for all lawful purposes by the employed as well as by the employers'. When the aims and purposes of the I.L.O. were restated in the Declaration of Philadelphia in 1944, the Conference reaffirmed as one of the fundamental principles on which the I.L.O. is based the principle that 'freedom of expression and of association are essential to sustained progress' and recognized the solemn obligation of the I.L.O. to further among the nations of the world programmes which will achieve 'the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures'. The terms of the Declaration of Philadelphia were incorporated in the Constitution of the I.L.O. in 1946.¹ These affirmations of principle have since been re-echoed in the Universal Declaration of Human Rights, which provides that 'everyone has the right to form and to join trade unions for the protection of his interests',² and in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which contains a similar provision that everyone has the right 'to freedom of association with others, including the right to form and to join trade unions for the protection of his interests', and specifies that 'no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.³

¹ See this *Year Book*, 23 (1946), pp. 303-17.

² Article 23 (4).

³ Article 11. The European Convention also provides that 'this Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State'.

Conventions concerning Freedom of Association

During the inter-war period conditions were not propitious for the adoption of an international convention embodying a clear-cut obligation to give effect to the principle of freedom of association set forth in the Constitution of the I.L.O. A convention prohibiting discrimination against agricultural workers in respect of the right of association was adopted in 1921 and received thirty-one ratifications prior to the outbreak of war, but an attempt to secure the adoption of a general convention concerning freedom of association was abandoned in 1927. In that year the Conference, when considering a draft questionnaire on the subject designed to elicit the views of Governments concerning the proposed convention, adopted an amendment safeguarding the right not to combine which was unacceptable to the Workers' group, and in these circumstances it was thought preferable not to proceed with the matter.

In pursuance of the renewed mandate to deal with the matters expressed in the Declaration of Philadelphia, the I.L.O. has adopted since the Second World War two conventions of general application on freedom of association and the right to organize, both of which are now in force, and a special convention for non-metropolitan territories.

The Freedom of Association and Protection of the Right to Organize Convention, 1948

The Freedom of Association and Protection of the Right to Organize Convention, 1948, had been ratified by 1 January 1952 by the following twelve countries: Austria, Belgium, Denmark, Finland, France, Iceland, Mexico, Netherlands, Norway, Pakistan, Sweden, United Kingdom. Further ratifications are pending.

The Convention provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.¹ The term 'organization' is defined as meaning any organization of workers or employers for furthering and defending the interests of workers or of employers.² The report on the Convention submitted to the International Labour Conference by its Committee on Freedom of Association records understandings that trusts and cartels are outside the scope of the Convention and that workers and employers have the right, within the limits of legality provided for in the Convention, to join any political or other organization.

The Convention provides that workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities, and to formulate their programmes,³ and that the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.⁴ The Convention also provides that workers' and employers' organizations shall not be liable to be dissolved or suspended by the administrative authorities,⁵ that workers' and employers' organizations shall have the right to establish and join federations and confederations, and that any such organization, federation, or confederation shall have the right to affiliate with international organizations of workers and employers;⁶ it specifies that the acquisition of legal personality by workers' and employers' organizations shall not be made subject to conditions of such a character as to restrict the application of the relevant provisions of the Convention.⁷

¹ Article 2.³ Article 3 (i).⁵ Article 4.⁷ Article 7.² Article 10.⁴ Article 3 (ii).⁶ Article 5.

The most difficult question to be dealt with in the Convention was that of the relationship between freedom of association and the obligation to respect the law of the land. The difficulty of the matter is apparent; on the one hand, no state could be expected to accept a right of association which is not qualified by an obligation to respect the law; on the other hand, there ceases to be any international obligation or guarantee of freedom of association if the extent of the right of association is determined by the national law. The difficulty was overcome by an article which provides that 'in exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised activities, shall respect the law of the land',¹ but that 'the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention'.² The report submitted to the Conference by its Committee on Freedom of Association records that this Article is not to be interpreted as involving any interference with the independence and authority of the judiciary. Broadly speaking, the effect of the article is to give each party to the Convention a reasonable discretion to take such action as may be necessary to secure respect for the general law but to make this discretion subject to review by the international procedures governing the application of international labour Conventions.

The Right to Organize and Collective Bargaining Convention, 1949

The Right to Organize and Collective Bargaining Convention, 1949, had been ratified by 1 January 1952 by the following four Members of the Organization: Austria, France, Sweden, United Kingdom. Further ratifications are pending. The Convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.³ Such protection is to apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership, or to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours. The report on the Convention submitted to the Conference by its Committee on Industrial Relations records the view that these provisions are not to be interpreted as authorizing or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice.

The Convention specifies that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their arrangements, functioning, or administration; in particular, acts which are designed to promote the establishment of worker's organizations and the administration of employers or employers' organizations or of separate workers' organizations by financial or other means with the object of placing such organizations under the control of employers or employers' organizations are to be deemed to constitute acts of interference.⁴ Machinery appropriate to national conditions is to be established where necessary for the purpose of ensuring respect for the right to organize⁵ and measures appropriate to national conditions are to be taken where necessary to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers' and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.⁶

¹ Article 8 (1).

³ Article 1 (1).

⁵ Article 3.

² Article 8 (2).

⁴ Article 2.

⁶ Article 4.

The Convention contains the same provisions as the 1948 Convention, leaving it to national laws or regulations to determine the extent to which the guarantees provided for therein apply to the armed forces and the police,¹ and an additional provision specifying that it does not deal with the position of public servants engaged in the administration of the state and is not to be construed as prejudicing their rights or status in any way.

The Right of Association (Non-Metropolitan Territories) Convention, 1947

The Right of Association (Non-Metropolitan Territories) Convention, 1947, had been ratified on 1 January 1952 only by the United Kingdom and still required a second ratification to bring it into force. It is of interest, however, that all of the Members of the Brussels Treaty Organization responsible for non-metropolitan territories have issued a statement indicating that favourable consideration is being given to the ratification of this and certain other conventions concerning non-metropolitan territories and that the United Kingdom ratification applies to virtually all of the non-metropolitan territories for which the United Kingdom is responsible.²

This Convention provides that the rights of employers and employed alike to associate for all lawful purposes shall be guaranteed by appropriate measures.³ All practicable measures are to be taken to assure to trade unions which are representative of the workers concerned the right to conclude collective agreements with employers' or workers' organizations,⁴ and to consult and associate the representatives of organizations of employers and workers in the establishment and working of arrangements for the protection of workers and the application of labour legislation.⁵

All procedures for the investigation of disputes between employers and workers are to be as simple and expeditious as possible.⁶ Employers and workers are to be encouraged to avoid disputes and, if they arise, to reach a fair settlement by means of conciliation; for this purpose all practicable measures are to be taken to consult and associate the representatives of organizations of employers and workers in the establishment and working of conciliation machinery; subject to the operation of such machinery, public officers are to be responsible for the investigation of disputes and are to endeavour to promote conciliation and to assist the parties in arriving at a fair settlement; where practicable these officers are to be officers specially assigned to such duties.⁷ Machinery is to be created as rapidly as possible for the settlement of disputes between employers and workers. Representatives of the employers and workers concerned, including representatives of their respective organizations, where such exist, are to be associated where practicable in the operation of the machinery, in such a manner and to such an extent, but in any case in equal numbers and on equal terms, as may be determined by the competent authority.⁸

In the fullness of time the Right of Association (Non-Metropolitan Territories) Convention will no doubt be superseded by the application to non-metropolitan territories of the provisions of the general conventions concerning freedom of association.

¹ Article 5.

² The exact list is as follows: Aden Colony, Bahamas, Barbados, Basutoland, Bechuanaland, Bermuda, British Guiana, British Honduras, Cyprus, Dominica, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast, Grenada, Hong Kong, Jamaica, Kenya, Leeward Islands, Federation of Malaya, Mauritius, Nigeria, North Borneo, Northern Rhodesia, Nyasaland, St. Helena, St. Lucia, St. Vincent, Sarawak, Seychelles, Sierra Leone, Singapore, Swaziland, Tanganyika, Trinidad, Uganda, Zanzibar.

³ Article 2.

⁴ Article 3.

⁵ Article 4.

⁶ Article 5.

⁷ Article 6.

⁸ Article 7.

It includes a clause laying down a procedure whereby its provisions can ultimately be replaced by those of any general conventions which so provide,¹ but it was thought premature at the time when the 1948 and 1949 Conventions were adopted to include in them any provision based upon this clause. Meanwhile, the Convention affords a basis for substantial progress in the non-metropolitan territories.

Procedure for the Examination of Allegations concerning Trade Union Rights

In addition to formulating these Conventions the I.L.O. has established, in agreement with the Economic and Social Council of the United Nations, a special procedure for the examination of allegations concerning the infringement of trade union rights. The general purpose of this procedure is to provide facilities for the impartial and authoritative investigation of the questions of fact raised by the various allegations of the infringement of trade union rights which have been referred to the I.L.O. by the Economic and Social Council or submitted directly to the I.L.O. It was pointed out when proposals for the establishment of the procedure were under consideration by the Governing Body that there may well be cases in which facilities for such investigation, if impartial in character, may be of great assistance to the governments concerned in clarifying situations which have become the subject of international controversy. The procedure is based upon a series of decisions taken by the Governing Body. The general effect of these decisions may be briefly summarized as follows:

The Fact-Finding and Conciliation Commission on Freedom of Association

The Governing Body has established a Fact-Finding and Conciliation Commission on Freedom of Association consisting of nine persons appointed by the Governing Body. These persons are chosen for their personal qualifications and are expected to discharge their duties with complete independence. The Commission is authorized to arrange for its work to be done, when appropriate, by panels of not less than three nor more than five members.

Under the procedure approved by the Governing Body it is open to the Governing Body to refer to the Commission for impartial examination any allegations of infringements of trade union rights which the Governing Body, or the Conference acting on the report of its Credentials Committee, considers it appropriate to refer to the Commission for investigation. It is also open to any Government against which an allegation of infringement of trade union rights is made to refer such an allegation to the Commission for investigation. The Commission is essentially a fact-finding body but is authorized to discuss situations referred to it for investigation with the Government concerned with a view to securing the adjustment of difficulties by agreement. The only complaints receivable, with the exception of those officially transmitted to the I.L.O. by the General Assembly or the Economic and Social Council of the United Nations, are those which come either from organizations of workers or employers or from governments. With the exception of cases covered by Article 26 of the I.L.O. Constitution, which relates to the supervision and application of Conventions ratified by a Member state, no complaint can be referred to the Commission without the consent of the Government concerned. If the Governing Body is of the opinion that a complaint should be investigated it must first seek the consent of the Government concerned. If such consent is not forthcoming, the Governing Body is to give consideration to such refusal with a view to taking any appropriate alternative action designed to safeguard the rights relating to freedom of association involved in the case, including measures to give full publicity to charges

¹ Article 11.

made, together with any comments of the Government concerned, and to that Government's refusal to co-operate in ascertaining the facts and in any measures of conciliation. It was contemplated that the consent of a Government might be given either in an individual case or more generally in advance for certain categories of cases or for any case which might arise. The Fact-Finding and Conciliation Commission is to report to the Governing Body on the results of its work and it will be for the Governing Body to consider in the first instance whether further action should be taken on the basis of the report. Subject to these arrangements and understandings, the Fact-Finding and Conciliation Commission is left to work out its own rules of procedure.

The allusion contained in the terms of reference of the Commission to Article 26 of the Constitution of the I.L.O. is designed to make it clear that the new procedure does not in any way replace the existing provisions of Articles 24 to 34 of the Constitution of the I.L.O. In virtue of Articles 24 and 25 of the Constitution any industrial association of employers or workers may make a representation that a state for which any Convention, including the Freedom of Association and Protection of the Right to Organize Convention, 1948, the Right to Organize and Collective Bargaining Convention, 1949, the Right of Association (Non-Metropolitan Territories) Convention, 1947, or the Right of Association (Agriculture) Convention, 1921, is in force is failing to secure the effective observance within its territories of the provisions of the Convention or Conventions to which it is a party, and the Governing Body may publish the representation and any statement made in reply to it. In virtue of Articles 26 to 34 any Member may file a complaint that another Member which is a party to one of these Conventions is failing to give effect thereto, and the Governing Body may refer such a complaint to a commission of inquiry. The Governing Body may also adopt the same procedure of its own motion or on receipt of a complaint from a delegate to the Conference. When the commission of inquiry has fully considered the complaint it is to prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think appropriate as to the steps which should be taken to meet the complaint and the time within which they should be taken. Another Government concerned in a complaint which does not accept the recommendations contained in the report of the commission of inquiry may refer the complaint to the International Court of Justice. In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the commission of inquiry or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith. These procedures provided for in the Constitution are applicable irrespective of the consent of the state concerned, subject only to that state having ratified the Convention non-observance of which is alleged. The new arrangements for the examination of allegations concerning freedom of association approved by the Governing Body and the Economic and Social Council do not in any way impair or qualify these provisions of the Constitution of the I.L.O.

Agreement has been reached between the Governing Body of the International Labour Office and the Economic and Social Council of the United Nations that the I.L.O. will maintain the Fact-Finding and Conciliation Commission on behalf of the United Nations as well as on its own behalf. The Governing Body and the Economic and Social Council have agreed upon the following procedural arrangements for this purpose.¹

¹ For the texts of the relevant documents see *Fourth Report of the International Labour Organization to the United Nations*, 1950, pp. 322-8.

All allegations regarding infringements of trade union rights received by the United Nations from Governments or trade union or employers' organizations against I.L.O. Member states will be forwarded by the Economic and Social Council to the Governing Body of the International Labour Office for consideration as to reference to the Commission. Such allegations received by the United Nations regarding any Member of the United Nations which is not a Member of the I.L.O. will be transmitted to the Commission through the Governing Body when the Secretary-General of the United Nations, acting on behalf of the Economic and Social Council, has received the consent of the Government concerned, and if the Council considers these allegations suitable for transmittal. The Secretary-General of the United Nations will seek the consent of the Government concerned before any consideration of the allegation by the Economic and Social Council. If such consent of the Government is not forthcoming, the Economic and Social Council will give consideration to such refusal with a view to taking any appropriate alternative action designed to safeguard the rights relating to freedom of association involved in the case. If the Governing Body of the International Labour Office has before it allegations regarding infringement of trade union rights against a Member of the United Nations which is not a Member of the I.L.O., it will refer such allegations in the first instance to the Economic and Social Council. The Commission's reports on cases regarding states Members of the United Nations not Members of the I.L.O. will be transmitted to the Economic and Social Council by the Director-General on behalf of the Governing Body. An account of the work of the Commission will be included in the annual report of the I.L.O. to the United Nations.

At the 33rd Session of the International Labour Conference in June 1950 the validity of the action taken by the Governing Body in establishing the Fact-Finding and Conciliation Commission on Freedom of Association was questioned by the Government of the Union of South Africa. After discussion the Conference adopted, by 92 votes to 3, with 21 abstentions, a report recommending that it should take note of the decisions on the establishment of the Fact-Finding and Conciliation Commission on Freedom of Association taken by the Governing Body and the Economic and Social Council of the United Nations, should express its satisfaction that agreement had been reached on the subject with the United Nations, and should approve and confirm the decisions taken by the Governing Body. This report recorded the views expressed by the Government members from Australia and South Africa at the conclusion of the discussion that, whilst not opposing the action which had been taken, it must not be taken that they accepted the constitutionality of the activities of the Commission except in so far as they related to ratified Conventions or were undertaken at the request of a state Member. The report also expressed the unanimous conviction of the Committee that the new machinery would be used in such a way as to have full regard to the need for its use being in conformity with the Constitution.

No state has yet given its consent to the reference of a case to the Commission, but this is not necessarily a ground for discouragement in view of the periods which elapsed before cases have been referred to other international bodies, including both the Permanent Court of International Justice and the International Court of Justice. A substantial number of cases has now passed through the earlier stages of the procedure for the examination of allegations without reference to the Commission.

The Governing Body Committee on Freedom of Association

In their original form the arrangements for the examination of allegations approved by the Governing Body provided that any communication proposing reference of

matters to the Fact-Finding and Conciliation Commission which might be received by the International Labour Office from Governments or from trade union or employers' organizations (other than formal requests from the General Assembly or the Economic and Social Council) would be examined in the first instance by the Officers of the Governing Body, who consist of the Chairman and the Employers' and Workers' Vice-Chairmen. If the Officers of the Governing Body considered that such communications warranted circulation to the members of the Governing Body as a whole, they would then be so circulated, and it would be open to any member of the Governing Body to take the matter up and suggest the reference of the case to the Commission.¹ Communications from other sources would not be receivable.

At its 117th Session, November 1951, the Governing Body decided that it was desirable to entrust the preliminary examination of allegations previously entrusted to the Officers to a wider group of its members and established for this purpose a Committee on Freedom of Association, consisting of nine members of the Governing Body and nine substitutes. It also took the following decisions concerning the procedure and terms of reference of this Committee. Any member of the Committee who is a representative or national of the state against which a representation has been made or is a person occupying an official position in the national association of employers or workers which has made the representation is disqualified from participating in the Committee when it is considering cases in which he is concerned. The Director-General is to communicate all allegations to Governments as soon as they are received unless he considers that there are special circumstances which make it desirable to refer a matter in the first instance to the Committee. The Committee is not to be called upon to express any view on the question whether a *prima facie* case had been made out; its responsibilities are essentially (1) to consider for recommendation to the Governing Body whether cases are worthy of examination by the Governing Body, and (2) where so determined affirmatively by the Governing Body, to attempt to secure the consent of the Governments concerned to the reference of such cases to the Fact-Finding and Conciliation Commission.

The Committee (after preliminary examination, including the consideration of any observations made by the Governments concerned, if received within a reasonable period of time) is expected to report to the next session of the Governing Body that a case does not call for further examination if the Committee finds, for example, that the alleged facts, if proved, would not constitute an infringement of the exercise of trade union rights; or that the allegations made are so purely political in character that it is undesirable to pursue the matter farther; or that the allegations made are too vague to permit a consideration of the case on its merits; or that the complainant has not offered sufficient evidence to justify reference of the matter to the Fact-Finding and Conciliation Commission.

When the Committee, after such preliminary examination, concludes that a case warrants further examination, it is to report this conclusion to the Governing Body for a determination as to the desirability of attempting to secure the consent of the Governments concerned to the reference of the case to the Fact-Finding and Conciliation Commission.

The Committee is to submit to each session of the Governing Body a progress report on all cases which the Governing Body has determined warrant further examination. In every case in which the Government against whom the complaint is made has refused

¹ For this stage in the development of the procedure see *Fifth Report of the International Labour Organization to the United Nations*, 1951, pp. 253-64.

consent to its reference to the Fact-Finding and Conciliation Commission or has not within four months replied to a request for such consent, the Committee is to include in its report to the Governing Body recommendations as to the 'appropriate alternative action' which the Committee may believe the Governing Body might take.

This Governing Body Committee on Freedom of Association set up by the Governing Body at its 117th Session met at the International Labour Office on 10-12 January 1952 under the Chairmanship of M. Paul Ramadier, Chairman of the Governing Body, formerly Prime Minister of France, and made a preliminary examination of thirty-nine complaints relating to freedom of association which had been received directly by the I.L.O. or referred to it by the Economic and Social Council. In twenty cases the Committee had before it observations concerning complaints from the Governments concerned. In a further thirteen cases the complaints had been communicated to the Governments concerned for their observations, but these observations had not yet been received. Six cases had been submitted to the Committee by the Director-General for its opinion prior to reference to the Governments concerned. The Committee recommended that seven of the twenty cases on which the observations of Governments had been received should be dismissed as not calling for further examination, for reasons indicated in detail in respect of each case in the report. In regard to ten of the twenty cases on which observations had been received, the Committee asked the Director-General of the International Labour Office to obtain further information from the Governments concerned before the Committee made its recommendations to the Governing Body. In two cases the Committee recommended that the matter should be further examined by the Governing Body. The Committee also fixed a date for the receipt of observations from Governments which had not yet submitted their observations concerning the complaints communicated to them. Details of the individual cases, a number of which involve complicated facts which it is unnecessary to discuss here, will be found in the documents of the International Labour Office.¹

General Principles enunciated by the Governing Body Committee

The Committee also found it necessary, however, in order to discharge the duty entrusted to it, to make a certain number of general comments which have some bearing on all international procedures for the examination of allegations concerning infringements of human rights and are therefore, it is believed, of sufficient interest to justify quotation in full.

‘III. GENERAL COMMENTS

‘26. In examining the cases which are pending before it, the Committee has been impressed by the extent to which the same questions constantly recur in different cases. It therefore proposes to submit to the Governing Body in general terms certain criteria by which in applying the mandate conferred upon it by the Governing Body, as defined in the preceding paragraph, it has been guided in considering individual cases and will, subject to any views which the Governing Body may express, continue to follow in examining further cases. It will, if the Governing Body agrees, continue in future to formulate in the same manner such further criteria as its experience may show to be necessary to enable it to discharge its task.

‘27. In accordance with the decision of the Governing Body, the only complaints receivable, with the exception of those officially transmitted to the International Labour Organisation by the General Assembly and the Economic and Social Council of the

¹ The first three reports of the Committee have been published in *Sixth Report of the International Labour Organization to the United Nations*, 1952, pp. 169-237.

United Nations, are those which come either from organisations of workers and employers or from Governments. Questions sometimes arise as to whether a particular complaint is to be regarded as having been made by an organisation of workers or employers. More particularly, it is sometimes suggested that persons purporting to act on behalf of such an organisation are not entitled to do so because the organisation has been dissolved or because the individuals lodging the complaint have ceased to be resident in the country concerned. The Committee considers that it would be altogether inconsistent with the purpose for which the procedure for the examination of allegations concerning the infringement of trade union rights has been established for it to admit that the dissolution or purported dissolution of an organisation by governmental action extinguishes the right of the organisation to invoke the procedure.

'28. Difficult questions may arise in such cases concerning the exact authority and knowledge of the facts of the persons claiming to act on behalf of the organisation concerned and the reliability of the testimony of persons no longer resident in the country concerned. The Committee will be prepared to consider such questions on their merits as necessary, but it will not regard any complaint as being irreceivable simply because the Government in question has dissolved or purported to dissolve the organisation on behalf of which the complaint is made, or because the person or persons making the complaint have taken refuge outside the country concerned. In taking this view it has been influenced by the conclusions unanimously approved by the Governing Body in 1937 in the *Labour Party of the Island of Mauritius Case* when considering a representation under Article 24 of the Constitution of the Organisation (then Article 23). In the *Mauritius Case* the Governing Body laid down the principle that it would exercise its discretion in deciding whether or not a body is to be regarded as an industrial association for the purpose of the Constitution of the Organisation and will not consider itself bound by any national definition of the term 'industrial association'. The Committee proposes to follow the same principles when considering the receivability of complaints which come before it.

'29. One of the responsibilities entrusted to the Committee by the Governing Body is that of reporting that a case does not call for further examination if the Committee finds that the allegations made are so purely political in character that it is undesirable to pursue the matter further. The Committee has not hesitated to recommend on its own initiative the dismissal of certain cases and of certain parts of other cases on this ground. It has further been necessary to consider what attitude the Committee should adopt in cases in which an allegation appears to the Committee to involve trade union rights but the Government concerned takes the view that the matter is political in character and should not be further pursued. The Committee proposes to be guided in such cases by the general principle laid down by the Officers of the Governing Body in their report concerning a communication received from the Minister of Social Affairs of Egypt relating to alleged conditions in the Suez Canal Area, which was unanimously approved by the Governing Body on 22 November 1951. The principle involved was formulated by the Officers of the Governing Body as follows:

"The Officers unanimously consider it inappropriate for the International Labour Organisation to discuss political questions directly related to international security; for it to do so would be inconsistent with its traditions and prejudicial to its usefulness in its own sphere. By the same token, they do not consider that the International Labour Organisation should assume the responsibility for transmitting to the United Nations communications concerning such questions. They recognise, however, that situations which are political in origin may have social aspects which the International Labour Organisation may be called upon to examine by appropriate procedures."

In accordance with this principle, the Committee proposes to form its own judgment in each case as to whether it should advise the Governing Body that the allegations made are so purely political in character that it is undesirable to pursue the matter further or whether its advice should be that although the case may be political in origin or present

political aspects, it raises questions directly affecting the exercise of trade union rights which call for further examination.

'30. With a view to avoiding the possibility of misunderstanding or misinterpretation, the Committee considers it necessary to make it clear that its task is limited to examining the allegations submitted to it. Its function is not to formulate general conclusions concerning the position of trade unions in particular countries on the basis of vague general statements but to evaluate specific allegations. It must reject as unfounded allegations which are not sufficiently substantiated to warrant further enquiry, even though the Committee, or a majority of its members, may not be convinced that the position of trade unions in the country concerned is in all respects fully satisfactory. While the rejection of any allegation on this ground does not preclude the interested parties from resubmitting the allegation accompanied by the necessary detailed evidence, it is clearly preferable to avoid a procedure which is liable to be prejudicial to the interests of governments and organisations alike. It follows that a special responsibility falls upon those lodging complaints to formulate their allegations in detail and to substantiate them with satisfactory evidence. If this is not done the Committee has no alternative but to report to the Governing Body that the allegations made are too vague to permit a consideration of the case on its merits, or that the complainant has not offered sufficient evidence to justify reference of the matter to the Fact-Finding and Conciliation Commission.

'31. Where, on the other hand, precise allegations are made, the Committee cannot regard as satisfactory replies from governments which are confined to generalities. More particularly, in cases in which precise allegations have been made concerning a *de facto* situation, the Committee cannot be satisfied with replies which simply refer to or recapitulate the applicable legal provisions. The purpose of the whole procedure is to promote respect for trade union rights in law and in fact, and the Committee is confident that, if it protects governments against unreasonable accusations, governments on their side will recognise the importance for the protection of their own good name of formulating for objective examination detailed factual replies to such detailed factual charges as may be put forward. In all cases in which the information supplied by governments to which complaints have been communicated appears to be inadequate or of too general a character, the Committee proposes to ask the Director-General to request the government concerned to supply it with more detailed information in order to enable it to express a considered view to the Governing Body. In any case in which a government does not respond within a reasonable period indicated by the Committee to such a request for more detailed information, the Committee will report the circumstances to the Governing Body.

'32. The function of the International Labour Organisation in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice; if the Organisation is to fulfil its responsibility in the matter it must avoid two opposite dangers; on the one hand it must not be distracted from its task by attempting to deal with a wide range of cases which it is neither appropriate nor necessary to examine internationally; and, on the other hand, it must not hesitate to discuss in an international form cases which are of such a character as to affect substantially the attainment of the aims and purposes of the International Labour Organisation as set forth in the Constitution of the Organisation, the Declaration of Philadelphia and the various Conventions concerning freedom of association.'

The Committee also pointed out in its report that further international consideration on a general basis of certain problems, including the question of the relationship between trade union rights and measures taken by the state in the discharge of its responsibility for the protection of public security and the question of measures for the protection of trade union funds against misuse, would be of considerable assistance to it in its future work. There is indeed a close relationship between the formulation of inter-

national obligations and standards concerning freedom of association and industrial relations and the examination of allegations concerning the infringement of trade union rights. While the international conventions are binding only upon the states which are parties to them, they do to some extent afford a standard of comparison, which can be taken into account in the examination of all allegations concerning the infringement of trade union rights. With regard to states which are parties thereto, they have, of course, the character of binding obligations.

C. W. J.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RECENT DEVELOPMENTS

I. *Ratification of the Convention*

THE European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950.¹ Under the terms of Article 66, ten ratifications are necessary before it will come into force. The Convention also contains provisions for two additional steps which may be taken by each signatory Government: these are a declaration accepting the competence of the Commission on Human Rights to receive petitions from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation of the Convention (Article 25); and a declaration recognizing as compulsory the jurisdiction of the European Court of Human Rights (Article 46). In other words, any state which ratifies the Convention must accept the general obligations contained therein, including the jurisdiction of the Commission on Human Rights to consider differences between states; but separate action is necessary to recognize its competence to receive individual petitions and to recognize the compulsory jurisdiction of the Court.² Under Article 56, eight declarations accepting the compulsory jurisdiction of the Court are necessary before the Court will come into existence.

The first ratification of the Convention was that of the Government of the United Kingdom. This was deposited with the Secretary-General of the Council of Europe on 8 March 1951. It was a simple ratification of the Convention. It did not accept either the competence of the Commission to receive individual petitions or the compulsory jurisdiction of the Court.

The second ratification was that of the Norwegian Government which was deposited on 15 January 1952. This ratification contained a reservation. Article 64 of the Convention permits reservations 'in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision'; reservations of a general character, however, are prohibited. The Norwegian reservation was based on Article 2 of the Norwegian Constitution of 17 May 1814 containing a ban on Jesuits and consequently excludes Jesuits from the application of Article 9 relating to freedom of thought, conscience, and religion. The Norwegian Government did not accept the competence of the Commission to receive individual petitions nor the compulsory jurisdiction of the Court of Human Rights.

The ratification of the Swedish Government was deposited with the Secretary-General on 4 February 1952. The Swedish ratification contains no reservations and was accompanied by a declaration recognizing the competence of the Commission on Human Rights to receive individual petitions.

¹ See this *Year Book*, 27 (1950), p. 145.

² For a fuller account of these provisions see this *Year Book*, 27 (1950), pp. 152-8.

By the end of February 1952, therefore, fifteen months after the date of signature of the Convention, only three ratifications had been deposited. While the process of ratification seems disappointingly slow, the reason for it is to be found mainly in the fact that a number of governments considered the original Convention to be seriously defective without the addition of the rights contained in an additional Protocol.¹ Consequently, they preferred to await completion of the Protocol and then submit both instruments to their national Parliaments for ratification at the same time. In some cases, indeed, they had grave doubts whether the Convention would be ratified at all without the additional provisions of the Protocol. Now that the latter has been completed, it is expected that the process of ratification will be accelerated. It still remains to be seen how many governments will be prepared to take the two additional steps of accepting the right of individual petition and the compulsory jurisdiction of the Court of Human Rights—the acceptance or rejection of which will largely determine the value of the Convention as a whole.

II. *Drafting the Protocol*

At the time when the European Convention on Human Rights was signed in Rome in November 1950, at the Sixth Session of the Committee of Ministers of the Council of Europe, it was decided, as mentioned in a previous volume of this *Year Book*,² to leave for later consideration the question whether it would be possible to obtain agreement on a protocol to the Convention relating to the rights of property, education, and free elections. The Committee of Ministers of the Council of Europe decided to convene a committee of experts to examine the proposals on these three rights which had been made by the Consultative Assembly in August 1950.³

A series of meetings was held by the governmental experts during the first half of 1951, as a result of which a draft protocol incorporating these three rights was submitted to the Committee of Ministers at its Ninth Session in August of that year. The Committee of Ministers approved this draft and transmitted it to the Consultative Assembly for its opinion. The Assembly Committee on Legal and Administrative Questions considered the draft at a special meeting held in Brussels in October 1951 and made certain proposals for redrafting the texts on education and free elections. The governmental experts considered these proposals at a further meeting in November and their conclusions were submitted to the Consultative Assembly during the second part of its Third Ordinary Session in November and December of that year. On that occasion the Assembly expressed its acceptance of all the proposals of the experts except on the subject of education, with regard to which it insisted substantially on the maintenance of its own earlier proposal. In February 1952 the experts reconsidered the matter once more in the light of the Assembly's comments and agreed to accept this proposal.

These negotiations over a period of a year showed that the rights of property, education, and free elections were among those for which it was most difficult to find satisfactory definitions. As statements of general principle, the articles of the Universal Declaration on Human Rights proclaimed by the General Assembly of the United

¹ See below, p. 365.

² Vol. 27 (1950), at p. 162.

³ Under the procedure of the Council of Europe the Consultative Assembly, consisting of 125 Members of Parliament from the fifteen Member countries, makes Recommendations, which the Committee of (Foreign) Ministers—being the executive organ of the Council—is then free to accept or reject. In fact, the preparatory work of the Consultative Assembly is done by its committees; in the case of human rights by the Committee on Legal and Administrative Questions. The preparatory work of the Committee of Ministers is done by committees of governmental experts; hence the frequent references to them in the text.

Nations in December 1948 served very well. The European Convention and its Protocol, on the other hand, will constitute legally binding commitments which will be subject to judicial interpretation; a much greater degree of precision was therefore necessary in their drafting.

It may be of interest to record some of the problems which were encountered during the course of the *travaux préparatoires*:

The right of property. The Consultative Assembly in August 1950 had proposed the following text:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subjected to arbitrary confiscation. The present measures shall not however, be considered as infringing, in any way, the right of a State to pass necessary legislation to ensure that the said possessions are utilised in accordance with the general interest.'

The first sentence of this text was readily accepted by the Governments. The second sentence, however, raised more difficult problems. The statement 'such possessions cannot be subjected to arbitrary confiscation' is not useful as a definition unless the word 'arbitrary' is itself defined, and no satisfactory definition thereof was suggested. An attempt was made to find one by introducing the idea of compensation. It was suggested that the article should include the sentence: 'No one shall be deprived of his property except . . . subject to the payment of adequate compensation.' The majority of the Governments were indeed at one time in favour of some such solution. However, some Governments, even though they grant compensation in the event of expropriation, were not prepared to have decisions taken on this matter by their national courts subjected to review by an international organ. Further, it was pointed out that cases exist in all countries where individuals are deprived of their property without compensation, for example, when a dangerous animal is killed in the public interest. It did not seem possible, therefore, to define 'arbitrary confiscation' by reference to the payment of compensation.

A further difficulty which arose from the definition proposed by the Consultative Assembly was that its last sentence recognized 'the right of a State to pass necessary legislation to ensure that the said possessions *are utilised* in accordance with the general interest', but made no provision for legislation affecting not merely the use but also the ownership of private property. In order to take account of these difficulties, the governmental experts produced a new definition of the right of property reading as follows:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest, and subject to the conditions provided for by law and by the general principles of international law.'

'The preceding provisions shall not, however, in any way infringe the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes, other contributions or penalties.'

It will be observed that this text permits the expropriation of private property 'subject to the conditions provided for by law', which will, in the great majority of cases, include the payment of compensation. In addition, a further guarantee is added by reference to 'the general principles of international law'. This provision was intended to guarantee compensation to foreigners for the expropriation of their property, even if compensation is not paid to nationals; it would therefore make it impossible for a state which nationalizes foreign property without adequate compensation to justify its action

on the ground that the foreign owners of property were treated on a footing of equality with its own citizens. It will also be observed that the final phrase of this text recognizes the right of the state to take private property for such purposes as taxes and fines. The Committee on Legal and Administrative Questions of the Consultative Assembly accepted without comment this revised text of this article, which was thereupon incorporated without change in the final Protocol.

The right to education. The text proposed by the Consultative Assembly was as follows:

'Every person has the right to education. The function assumed by the State in respect of education and of teaching may not encroach upon the right of parents to ensure the religious and moral education and teaching of their children in conformity with their own religious and philosophical convictions.'

This text raised many problems. The first was occasioned by the initial statement of principle: 'Every person has the right to education.' It was believed that this phrase might be interpreted as imposing on the state the positive duty to provide education for everyone within its frontiers. While this is undoubtedly the policy of all Member states of the Council of Europe, it is impossible for them to guarantee to implement this policy down to the last man, woman, and child in the country. A case of particular difficulty, especially on the Continent, is presented by the children of bargees, who live on barges and have no fixed residence. In some countries there are undoubtedly children in outlying country districts for whom schools may not be available or sufficiently accessible. Again, in nearly all countries there are a certain number of illiterate adults. For this reason a negative statement of the principle was preferred in the words 'No person shall be denied the right to education'.

The second difficulty in the Assembly's text on the right to education arose from the reference to 'the right of parents to ensure the religious and moral education and teaching of their children in conformity with their own religious and philosophical convictions'. All Governments were agreed that parents should have the right to secure the education of their children in accordance with their own religious creeds, but philosophical convictions raised a much more difficult problem. In the first place, this would imply liberty for the children to be brought up as agnostics or atheists, whereas the constitutions or legislation of some Member countries require that all children be given religious instruction, even though the parents are free to choose which religion it shall be. Another difficulty arose from the fear that freedom for 'philosophical convictions' might also relate to Marxism and Communism and thus force Governments which might be fighting Communism abroad to permit the education of young Communists at home; in reply to this argument, however, the Legal Committee of the Consultative Assembly pointed out with justice that Article 17 of the Convention contained a general safeguard in the provision:

'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

Nevertheless, the notion of 'philosophical convictions' remains a nebulous and even elastic concept. Does it include vegetarianism, or polygamy, or nudism, or the tenets of the anti-vivisectionist? Where shall the line be drawn between philosophical convictions whose freedom should properly be respected and the convictions of cranks or faddists?

Having regard to these difficulties, the governmental experts rewrote the definition of the right to education and adopted the following text:

'No person shall be denied the right to education. In the exercise of any functions which it may assume in relation to education and to teaching, the State shall have regard to the right of parents to ensure the religious education of their children in conformity with their own creeds.'

When this text was considered by the Legal Committee of the Assembly in October 1951, the Committee took exception to it on three grounds. In the first place, the undertaking of the state 'to have regard to the right of parents' was considered to be too vague. In the second place, the Assembly Committee considered this text unsatisfactory because it only related to the 'education' of the children and not to their 'education and teaching'. The importance of this change is more apparent in the French text than in the English. In French, the preservation of the word *éducation* and the suppression of the word *enseignement* would restrict the meaning of the text to the general moral and spiritual education of the children, and exclude their intellectual education or school teaching. In the third place, the Assembly Committee objected strongly to the suppression of the reference to philosophical convictions. The Committee was of the opinion that the restriction of the right to religious convictions was a retrograde step which would be firmly resisted by national Parliaments.

The Assembly Committee therefore proposed the adoption of the following text:

'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

When this question was reconsidered by the governmental experts in November 1951, on the basis of the new proposal mentioned in the preceding paragraph, they still maintained their position on two of the points criticized by the Consultative Assembly, that is to say the exclusion of philosophical convictions, on the ground that they were too uncertain and ill defined, and the limitation of the undertaking of each signatory state to the phrase 'the State *shall have regard to* the right of parents . . . &c.' Nevertheless, in an endeavour to meet the wishes of the Assembly on the point which they believed to be the most important, the experts added to their previous text a new clause intended to guarantee the right of private education, that is to say teaching in schools other than state schools (in French, *enseignement libre*). For this purpose the following addition was made:

' . . . and, where schools have been established by the State, to send their children to any other school of their choice, provided that such school conforms with the requirements of the law.'

When the article on education was reconsidered with this addition by the Legal Committee of the Assembly in December 1951, its misgivings were far from dispelled. The Committee asserted that, from the legal point of view, it was meaningless to state in a declaration of rights backed by a judicial sanction that the signatory states would be obliged merely 'to have regard to' the right of parents; it added that the totalitarian régimes which hang their adversaries 'have regard'—at the end of a rope—to the latter's right to live. The Committee renewed its demand that the right to education should apply not only to education but also to teaching (*enseignement*); similarly, it renewed its demand that the right should apply not only to religious but also to philosophical convictions. The Committee therefore proposed, and the Consultative Assembly recommended to the Committee of Ministers, that the right to education should be worded as follows:

'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

When this proposal was once more reconsidered by the governmental experts, the majority of them agreed to accept the view which had been put forward so insistently by the Consultative Assembly. Certain experts repeated the reasons why this text was not acceptable to their Governments and indicated that, if it were to be included in the final protocol, their Governments would feel bound to make reservations. The consensus of opinion, however, was that it was preferable to meet the wishes of the Consultative Assembly, since it attached so much importance to this question, even though this would involve the admission of reservations in the final document.

Free elections. The text proposed by the Consultative Assembly in August 1950 was as follows:

'The High Contracting Parties undertake to respect the political liberty of their nationals and, in particular, with regard to their home territories, to hold free elections at reasonable intervals by secret ballot under conditions which will ensure that the government and legislature shall represent the opinion of the people.'

When the governmental experts came to examine this text, they discovered certain difficulties. In the first place, what would be the meaning of the undertaking by the Contracting Parties 'to respect the political liberty of their nationals'? If it was intended to relate to such rights as freedom of assembly, freedom of opinion and freedom of association, it was unnecessary, because these rights were already covered by separate provisions in the Convention itself. If, on the other hand, it was intended to relate to other rights, it was imprecise and its meaning obscure. In the second place, the experts considered the phrase 'with regard to their home territories' to be unnecessary, since the whole Protocol would only apply to the metropolitan territories of the Contracting Parties in default of an express declaration extending its application to overseas territories. Thirdly, the expression 'under conditions which will ensure that the Government and legislature shall represent the opinion of the people' might be construed as a commitment to some form of proportional representation.

The experts therefore prepared a new text on the subject of free elections reading as follows:

'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

When this draft was considered by the Legal Committee of the Consultative Assembly in October 1951, the Committee proposed yet a further text, reading as follows:

'The High Contracting Parties undertake to hold free elections of the legislature at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the will of the people.'

In the following month, the governmental experts reconsidered the matter but were not convinced that the Legal Committee's draft was preferable to their own, since the words 'the High Contracting Parties undertake to hold free elections of the legislature' might be interpreted as an obligation to hold elections for both Chambers of the legislature. This was unacceptable to the Governments of certain countries where the Upper Chamber is, either in whole or in part, not elective but hereditary (as in Great

Britain) or appointed (as in Belgium). For this reason the experts felt it necessary to maintain their previous text. The Legal Committee of the Assembly in December 1951 made no further comment on this article, with the result that it has been maintained as drafted by the experts in July 1951.

The remaining articles of the Protocol are of a general nature designed to make it clear that the Protocol itself forms an integral part of the main Convention as signed in November 1950. In particular, the substance of Article 63 of the main Convention is reproduced in Article 4 of the Protocol, but in a slightly different formulation which will make it possible for a signatory state to extend to its overseas territories, by a specific declaration, the application of one or more of the three rights guaranteed in the Protocol, without such a declaration necessarily involving all three at the same time.

The final text of the Protocol was signed at Paris on 20 March 1952 on behalf of the same fifteen Governments which were signatories to the Convention on Human Rights of 4 November 1950.

A. H. ROBERTSON

RES JUDICATA: SOME RECENT DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

THIS Note has the limited purpose of discussing some recent decisions of the International Court of Justice in which the question of the force of *res judicata* attaching to its own judgments became relevant. It is not concerned with the wider problems posed for international law by the existence of the principle of *res judicata*.¹ This issue, restricted to the nature and value of the *res judicata* attaching to its own judgments, appears to have arisen in only one case in the history of the Permanent Court of International Justice, namely, in the *Chorzów Factory* case.² The recent jurisprudence of the Court is an important contribution to this branch of the law.

The Statute makes a distinction between the 'binding force' of its 'decisions' and the 'finality' of its 'judgments', and it is from the combination of these two notions that the formal framework of the concept of *res judicata* emerges. Thus we find, in Article 59 of the Statute, that the decision of the Court has no binding force except between the parties and in respect of that particular case. ('La décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé.') This is reinforced by the contractual obligation contained in Article 94 of the United Nations Charter whereby each member undertakes to comply with the decision of the Court in any case to which it is a party. Article 59 of the Statute is paralleled by Article 63, which specifies the occasions on which third states have the right to intervene in pending proceedings. Paragraph 2 of this Article lays down that if a third state uses this right, the construction given by the judgment will be equally binding upon it. ('S'il exerce cette faculté, l'interprétation contenue dans la sentence est également obligatoire à son égard.')

On the other hand, the finality of the judgment is specifically provided for in Article 60 of the Statute in clear language: 'The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.' ('L'arrêt est définitif et sans recours. En cas de

¹ See as to this Limburg, 'L'autorité de chose jugée des décisions des juridictions internationales', in *Recueil des Cours de l'Académie de Droit de la Haye*, 30 (1929), p. 507; Scelle, *Report on Arbitration Procedure to the International Law Commission* (A/CN. 4/18), pp. 56, 75.

² See judgments of 16 December 1927 (*P.C.I.J.*, Series A, No. 13), and of 13 September 1928 (*P.C.I.J.*, Series A, No. 17).

contestation sur le sens et la portée de l'arrêt il appartient à la Cour de l'interpréter, à la demande de toute partie.')

It will be seen that, as was pointed out by Judge Anzilotti in his Dissenting Opinion to the Judgment of 16 December 1927 in the *Chorzów Factory* case (*P.C.I.J.*, Series A, No. 13, p. 23), these articles formally establish the essential conditions for the existence of a *res judicata*, namely, the existence of a final judgment together with identity of parties, identity of cause, and identity of object in the subsequent proceedings. Article 59 determines the material limits of the *res judicata* and Article 60 its formal value. The protracted proceedings in the *Corfu Channel* case between Great Britain and Albania, and later in the *Asylum* case between Colombia and Peru, gave the International Court of Justice the opportunity of developing its jurisprudence on the subject. In the former case the issue relates to the formal value of the *res judicata* and appears as one of procedure: in the latter case it is concerned with the material limits, and is thus a matter of substance.

The relevant facts in the *Corfu Channel* case are the following: On 22 May 1947. Great Britain, after the Security Council had made certain recommendations, instituted proceedings against Albania by application, invoking the doctrine of *forum prorogatum*. She specifically claimed certain pecuniary damages from Albania in respect of alleged breaches of international law involving Albania's responsibility. In due course the Memorial was filed, pursuant to an Order of the Court, and this contained particulars of the amounts so claimed, without, however, bringing the evidence in support thereof. Within the time-limit for the filing of the Counter-memorial, and in accordance with the procedure of the Court, Albania filed a preliminary objection, which the Court dismissed in its judgment of 25 March 1948 (*I.C.J. Reports*, 1948, p. 15). Immediately after the delivery of this judgment the parties notified to the Court the conclusion of a Special Agreement which, in addition to asking whether Albania was under 'any duty to pay compensation' for the acts complained of, also raised a new point, namely, whether the United Kingdom was under 'any duty to give satisfaction' for certain other acts of which Albania complained. This Special Agreement then formed the basis for the further proceedings, and the Court in the usual way laid down by Order the time-limits for the remainder of the written pleadings which were to consist of the Albanian Counter-memorial, British Reply, and Albanian Rejoinder. The British Government maintained its specific claim to damages throughout the case, i.e. in its written reply and in its oral pleadings, although no evidence in support of the sums claimed was adduced. However, in the last oral statement submitted in its name, the Albanian Government, for the first time, asserted that the Court would not have jurisdiction, in virtue of the Special Agreement, to assess the amount of compensation due by Albania to Great Britain. No reason was given for this new assertion, and the United Kingdom Agent did not ask leave to reply. The question of the Court's jurisdiction was not argued between the parties (*I.C.J. Reports*, 1949, p. 23). After the Court had found Albania responsible in law for the damage complained of, the question of the pecuniary compensation had to be considered. This, in the first place, involved an interpretation of the Special Agreement. On various grounds not here relevant the Court decided, by ten votes to six, that on a proper interpretation of the Special Agreement it did possess the necessary jurisdiction to assess the amount of compensation. However, as the evidence had not been produced to the Court, and as the question of the amount had not been fully discussed by either party, it reserved for further consideration the assessment of the amount of compensation, including an article to this effect in the operative clause (*dispositif*) of the judgment (judgment of 9 April 1949: *ibid.*, at

p. 36). These further proceedings were regulated by an Order of the same date. The details of the British claim having been included in the original Memorial, this Order laid down that the further written pleadings were to consist of observations by Albania, and a further reply and rejoinder by Great Britain and Albania respectively (*ibid.*, p. 171). In its observations filed in accordance with this Order Albania again asserted the lack of jurisdiction of the Court, again without giving reasons (*Corfu Channel case, Pleadings*, vol. ii, p. 400). In its reply (*ibid.*, p. 390) the British Government pleaded, on this issue of jurisdiction, that the matter was *res judicata*, citing Articles 36 (6) and 60 of the Statute, and the judgment of 9 April 1949. Article 36 (6) of the Statute prescribes that if there is any dispute as to the jurisdiction of the Court, the matter shall be decided by a decision of the Court. No further observations were filed by Albania, which took no further part in this stage of the proceedings, and thus the issue of compensation came up for what might be termed judgment by default.

The Court gave its judgment on 15 December 1949 (*I.C.J. Reports*, 1949, p. 244). The Court accepted the plea of *res judicata* in emphatic terms.

'The Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its judgment of April 9th, 1949; that, in accordance with the Statute (Article 60) which, for the settlement of the present dispute, is binding upon the Albanian Government, that judgment is final and without appeal, and that therefore the matter is *res judicata*' (p. 248).

It will be noted that the Court refrained from basing itself on Article 36 (6) of the Statute, which had been invoked by the United Kingdom. No reason was given for this. It is possible that one may be found in an unexpressed desire that the issue of *res judicata* should remain within the orbit of Chapter III of the Statute, relating to procedure, and not be brought into the scope of Chapter II, which relates to the competence of the Court. In this case the *res judicata* is clearly procedural. Its procedural quality is demonstrated by the fact that it immediately gave rise to the application of Article 53 of the Statute, which specifies the procedure to be followed when one of the parties does not appear before the Court. The judgment of 9 April was declaratory, not as an end in itself, but as a step in awarding the damages or satisfaction, which alone, after the Court had interpreted the Special Agreement, put an end to the dispute.

In the *Asylum* case the proceedings were instituted in 1949 and arose out of a dispute which followed a grant of diplomatic asylum to a political refugee by the Colombian Embassy at Lima. The Court was asked two, seemingly abstract, points of law relating to diplomatic asylum and to the interpretation of certain Conventions operative in this regard. It is interesting that neither in the claim of Colombia nor in the counterclaim of Peru was the Court asked specifically as to the method of terminating the asylum. Judgment was given on 20 November 1950 (*I.C.J. Reports*, 1950, p. 266). In it the Court gave its answers to the questions put to it in the submissions of the parties. It indicated that the question of the possible surrender of the refugee to the Peruvian authorities was not raised, either in the diplomatic correspondence submitted to the Court by the parties or at any moment in the proceedings (*ibid.*, p. 280). It did not, therefore, decide on this point, nor does any mention of it appear in the operative clause of the judgment. Immediately after delivery of the judgment Colombia filed a request for interpretation under Article 60 of the Statute on the ground that certain gaps existed in the judgment. One of the questions put to the Court in this request related to the qualification which in fact had been made by the Colombian Ambassador in Lima. The other questions related to the surrender of the refugee to the Peruvian authorities.

On 27 November 1950 the Court gave its judgment (*ibid.*, p. 395). It indicated that the question of the qualification had not been raised in the submissions of the Colombian Government, and proceeded in fact to explain not what its decision meant, but what it actually had decided. As for the question of the possible surrender of the refugee, this was 'completely left outside the submissions of the parties. The judgment in no way decided it, nor could it do so. It was for the parties to present their respective claims on this point. The Court finds that they did nothing of the kind' (p. 453). At the same time the Court made certain statements explaining Article 60 of the Statute. We will refer to these later, as they have an indirect bearing on the problem of *res judicata*. Following upon this judgment a further diplomatic exchange took place between the parties, and in January 1951 new proceedings were instituted by Colombia and entitled by the Court the *Haya de la Torre* case. The object of these new proceedings was to obtain the Court's decision as to whether or not Colombia was bound to deliver the refugee to Peru, and thus to terminate the asylum. In February 1951 the Government of Cuba, which was signatory to one of the Conventions cited by Colombia in its application, invoked Article 63 of the Statute relating to intervention and filed a Declaration of Intervention to which was attached a Memorandum stating its views on certain topics. This Memorandum was in fact almost entirely devoted to a discussion of the questions decided by the judgment of 20 November 1950. The Government of Peru objected to the admissibility of this intervention, in accordance with the procedure described in Article 66 of the Rules of Court. (Article 63 of the Statute apparently gives an absolute right to intervene in certain circumstances: however, Rule 66 gives the Court power to decide if objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute). Oral proceedings limited to the admissibility of the intervention of Cuba took place immediately before the oral proceedings on the merits, and the Court decided to admit the intervention in so far as it was based on the fact that it was required to interpret a new aspect of the Convention which it had not been called upon to consider in its judgment of 20 November 1950. Its reasons for this decision were, however, included in a single judgment of 13 June 1951, which also disposed of the merits of the dispute (*I.C.J. Reports*, 1951, p. 71). The question of *res judicata* was found to arise in both parts of this judgment.

In that part of the judgment which deals with intervention the Court explained that the subject-matter of the case before it differed from that of the case which was terminated by the judgment of 20 November 1950, for it concerned a question which was completely outside the submissions of the parties and which was in consequence in no way decided by that judgment. The written memorandum of Cuba attached to the Declaration of Intervention was devoted almost entirely to a discussion of the questions which the earlier judgment had already 'decided with the authority of *res judicata*, and . . . to that extent it does not satisfy the conditions of a genuine intervention' (*ibid.*, p. 77). However, to the extent that the intervention was based on the fact that the Court was required to interpret a new aspect 'which the Court had not been called upon to consider in its previous judgment', and 'operating within these limits', the Court found that the intervention conformed to the conditions of Article 63 of the Statute, and could therefore be admitted.

The Court then discussed the merits of the dispute. One set of submissions of both parties requested the Court to state how its previous judgment should be executed. Its answer was that its previous judgment had confined itself to defining the legal relations between the parties. In the next submission Colombia requested the Court to declare that Colombia was not bound, *in execution of the judgment of 20 November 1950*,

to deliver the refugee to the Peruvian authorities. Here the Court recalled what was stated in that judgment, namely, that 'this question was not submitted to the Court, and consequently was not decided by it'. No conclusion as to the existence or non-existence of such an obligation can therefore be drawn from that judgment. This submission was therefore rejected. Alternatively the Court was asked, without specific reference to the previous judgment, whether Colombia was bound to deliver the man to the Peruvian authorities. As to this the Court said: '... the question of the surrender of the refugee was not decided by the judgment of November 20th. This question is new. . . . There is consequently no *res judicata* upon the question of surrender' (ibid., p. 80). It therefore proceeded to deal with this question on the merits. A large part of this section of the judgment is in fact an interpretation of the previous judgment, or carries it a stage farther by explaining the legal consequences thereof. This is an example of the positive and probative *res judicata* which appears as a spring-board from which the Court can reach for the answers to the submissions which, not having been put forward by the parties in the first case, now formed the subject-matter of the second case. It is not a matter of procedure, but of substance. While this case thus shows some similarities with the *Lighthouses* case between Greece and France, heard by the Permanent Court of International Justice, it is clearly distinguishable from it in that in that case the judgment of 17 March 1934 (*P.C.I.J.*, Series A/B, No. 62) expressly reserved a certain question which was decided in the judgment of 8 October 1937 (ibid., No. 71), whereas in the *Asylum* case the judgment contains no such express reservation.

These two series of cases are useful illustrations of the two types of *res judicata* that can arise. The *Corfu Channel* case is a simple case in the sense that the *res judicata* is included in and derives its force from the operative clause of the judgment of 9 April 1949, and thus fulfils the formal conditions for the finality of the judgment as laid down in the Statute. The fact that the question itself was not argued by the parties is probably not relevant. What is relevant, and what is only implicit in the judgment of the Court, is that the party against whom the plea of no jurisdiction was raised had the opportunity, which it did not exercise, of replying to the simple averment of its opponents. The relevance of whether the question was argued between the parties arises only if it is necessary to determine the scope of the *res judicata*. In the *Corfu Channel* case the question of scope did not arise, and the result is that not only are the formal or statutory conditions for the existence of a *res judicata* clearly established, but also its essential—or jurisprudential—conditions as well.

In the *Asylum* case, however, the problem was not that of the existence of a final judgment, but of the binding force of a decision. The *res judicata* in fact does not derive from the operative clause of the judgment itself, which was purely declaratory and confined itself to stating which submissions of the parties were rejected or accepted, and to what extent. In other words, it is an example of the principle *res judicata pro veritate habetur* arising out of what was a declaratory judgment. That judgment failed to bring the dispute to an end, for the simple reason that the submissions of the parties were insufficient for this purpose. What is entailed in establishing the scope of a judgment was clearly explained in the judgment of 27 November 1950 on the question of the admissibility of the request for interpretation (*I.C.J. Reports*, 1950, p. 395), where the Court found it necessary to analyse Article 60 of the Statute. In doing this it explained that the real purpose of a request under that Article must be to obtain an interpretation of the judgment in question. 'This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with

binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal' (ibid., p. 402). How is this to be established? The answer given by the Court neatly defines the fundamental nature of the judicial function. 'One must bear in mind the principle that it is the duty of the Court not only to reply to the questions stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.' This, it is submitted, leads to the conclusion that the word 'decision' (*décision*) appearing in Article 59 of the Statute is identical in meaning with the word 'judgment' (*arrêt*) appearing in Article 60, and refers not merely to the operative clause (*dispositif*) of the judgment, but to its reasons as well. This is clearly the case as regards the meaning of the word 'judgment' (*sentence*) appearing in Article 63.

It may be noted that the existence of a *res judicata* may produce legal effects even with regard to states not parties to it. This appears from that part of the judgment of 13 June 1951 which declared the intervention to be inadmissible in relation to matters already decided in the previous judgment with the authority of *res judicata*. As to this, it seems permissible to express hesitation whether the existence of such a *res judicata* is the true ground for holding the request to intervene inadmissible. Clearly there is no *res judicata* between the intervening state and either of the parties to the previous judgment: the essential condition of identity of parties is not fulfilled. A state whose right to intervene has been upheld cannot be met with a plea of *res judicata*. The real ground for rejecting this part of the intervention seems to be that it is completely irrelevant, the irrelevancy being established, however, by the existence of the positive and probative *res judicata* binding on the actual parties to the litigation, to which the intervention is incidental.

The *Corfu Channel* case also illustrates the rule that the force of *res judicata* attaches only to judgments of the Court, and not to other decisions which are embodied in Orders. On the other hand, the conduct of a party which leads the Court to make a certain Order may create an estoppel, which, if the same matter comes up for decision in a judgment, can be transformed into a *res judicata*. After the original British application was filed it was communicated to the Albanian Government which, in its reply, after raising certain objections to the application, indicated that it was prepared to appear before the Court (*Pleadings*, vol. v, p. 136). On this basis the Court made an Order fixing certain of the time-limits for the written proceedings (*I.C.J. Reports*, 1947-8, p. 4). The jurisdiction of the Court was later challenged in a preliminary objection, to which reference has already been made. The Court's judgment, rejecting the preliminary objection, was based primarily upon the said reply of the Albanian Government (ibid., p. 15). There are, however, two differences between the Order and the Judgment. The Order was made by the President alone, under Article 37 of the Rules of the Court, whereas the Judgment, of course, was delivered by the full Court. Secondly, the Judgment formally places on record, in its operative clause, a certain reservation contained in the reply of the Albanian Government. No mention of this reservation appeared in the Order. In practice an estoppel of this nature may be virtually indistinguishable from a *res judicata*.

The Court has also confirmed, somewhat indirectly, that its Advisory Opinions do not create a *res judicata* for the reason that such Opinions have no binding force (Advisory Opinion of 30 March 1950 on *Interpretation of Peace Treaties*, at p. 71). In this connexion some of the dissenting judges drew a proper distinction between the formal nature of a *res judicata* and the moral consequences inherent in the dignity of the organ

delivering the Opinion (*per* Judge Azevedo, at p. 80, Judge Winiarski, at p. 91, and Judge Zoričić, at p. 101). In other words, while the jurisprudence of the Court formally rejects the existence of the negative type of *res judicata* in so far as concerns its advisory opinions, it is not possible to utter firm conclusions about the non-existence of the positive or probative type. Indeed, if anything, there are other *dicta* of the Court which supply indications that the positive type of *res judicata* can result from an advisory opinion. Thus, in its Advisory Opinion of 3 March 1950 on the *Competence of the Assembly regarding Admission to the United Nations* (I.C.J. Reports, 1950, p. 4) the Court, in discussing arguments against its competence to interpret the Charter, used language such as 'the Court will simply recall that, in a previous opinion. . . it declared' and 'as the Court stated in the same Opinion . . .' and 'Consequently the Court, in accordance with its previous declarations, considers that it is competent . . .' (ibid., pp. 6, 7). Somewhat similar language was used in its Advisory Opinion of 28 May 1951, concerning *Reservations to the Convention on Genocide* (I.C.J. Reports, 1951, p. 15, at p. 19). Such language can, of course, be interpreted as being an application of something akin to the English doctrine of *stare decisis*, though it would be difficult to justify the use of such a doctrine by an international tribunal applying, in accordance with Article 38 of the Statute, 'international law'. On the other hand it appears equally possible to regard it as indicative of a metamorphosis of the positive or probative *res judicata* to suit the peculiar conditions in which the Court carries out its advisory functions.

The proceedings in the *Asylum* case in particular, and to a lesser extent those in the *Corfu Channel* case also, bring into sharp relief the delayed-action effect attaching to the written and oral pleadings. In the last analysis the scope of the *res judicata* can only be determined by reference to the pleadings in general, and the submissions of the parties in particular. As the Court said in its Judgment of 27 November 1950 (p. 403), the limits of the judgment are fixed in advance by the parties themselves in their submissions. These also make it possible to determine whether any part of the Judgment is to be regarded as *obiter dicta* which would not give rise to any *res judicata*. This reflection raises wide questions as to the whole technique of the pleading in international litigation—a matter far removed from the compass of this short Note.

S. ROSENNE

THE ORIGINS AND DEVELOPMENT OF ARTICLE 99 OF THE CHARTER

THE POWERS OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

ARTICLE 99 of the Charter of the United Nations, which provides that 'The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security', was described by the Preparatory Commission of the United Nations as endowing the Secretary-General with 'a quite special right which goes beyond any power previously accorded to the head of an international organization'.¹ This description is perhaps slightly exaggerated as it fails to take account of resolutions of the First and Second Assemblies of the League of Nations which entrusted the League Secretary-General with powers of a nature remarkably similar to those with which the United Nations Secretary-General is invested by Article 99.² But the words of the Preparatory Commission aptly

¹ Preparatory Commission, *Report*, Doc. PC/20, p. 87.

² The First Assembly adopted on 10 December 1920 a Report on the Implementation of Article XVI of the Covenant which in part read:

'It shall be the duty of the Secretary-General to call to the attention of the Council any

emphasize that, with respect to the express constitutional position of the Secretary-General of the international political organization, Article 99 represents a departure of consequence.

The substance of Article 99 is not to be found in the Covenant. While in the early drafts of the Covenant powers were to have been allotted to the Secretary-General which may be said to have approached those later given to the Secretary-General of the United Nations,¹ the text of the treaty which finally emerged from the Paris negotiations provided in its analogous article merely that, in case of war or threat of war, 'the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council'.² The Secretary-General's lack of express political authority in the Covenant, in that and in other articles,³ was given emphasis by the attitude of the holders of the post, who confined their political initiative to private, 'behind-the-scenes' activity.⁴

The desirability of a provision in the constitution of the organization which would succeed the League on the lines expressed in Article 99 was agreed upon in essence as early as 1940 by the Advisory Committee on Foreign Relations of the Department of State.⁵ In 1943 the then Viscount Cranborne suggested, in a similar vein, that 'it will be necessary in the new organization, that the chief permanent official . . . who will be

facts which in his opinion show that a member of the League has become a Covenant-breaking state within the meaning of Article XVI;

'Upon receiving such an intimation, the Council shall, on the request of any of its members, hold a meeting with the least possible delay to consider it.'

The Second Assembly adopted on 4 October 1921 Interpretive Resolutions regarding Article XVI, one of which prescribed that 'if a breach of the Covenant be committed, or if there arise a danger of such breach being committed, the Secretary-General shall at once give notice thereof to all members of the Council. Upon receipt . . . of such notice by the Secretary-General, the Council will meet as soon as possible' (quoted in Rappard, *The Quest for Peace* (1940), pp. 227, 237. Professor Rappard discusses the origin of these Resolutions, pp. 220 ff.).

These Resolutions were not of course equal in weight to provisions of the Covenant. Moreover, inasmuch as they referred to Article XVI alone, their activation may be said to have depended upon the prior fulfilment of the first clause of that article: 'Should any member of the League resort to war in disregard of its covenants' The late Earl of Perth explains his failure to implement the Resolutions by reference to this latter consideration (see Schwebel, *The Secretary-General of the United Nations: His Political Powers and Practice* (1952), p. 231).

¹ See Howard-Ellis, *The Origin, Structure and Working of the League of Nations* (1928), p. 163, n. 2; Schwebel, op. cit., p. 227, nn. 3 and 4; Viscount Cecil, *A Great Experiment* (1941), p. 89; Hunter Miller, *The Drafting of the Covenant* (1928), vol. II, pp. 108, 110, 120-1, 142.

² Article XI.

³ Those relating to the Secretary-General's powers are Articles VI, VII, XI, XV, and XVIII. For analyses which accent the political authority latent in these articles see Morley, *The Society of Nations* (1932), pp. 309-14, 264-5, 486, 566; and Cagne, *Le Secrétariat Général de la Société des Nations* (1936), pp. 54-66, 81-128.

⁴ See Walters, *A History of the League of Nations* (1952), vol. i, pp. 75-80, vol. ii, pp. 556-60; and Schwebel, op. cit., pp. 3, 6-10, 216-21, 253.

⁵ See 'Memorandum of May 1, 1940, by Hugh R. Wilson, vice-chairman of the Committee Arising from Conversations in Mr. Welles' Office, April 19 and 26', as reproduced in Department of State, *Postwar Foreign Policy Preparation, 1939-1945* (1949), Pub. 3580 (hereinafter cited as *Policy Preparation*), Appendix 5, p. 459: 'There should be established a permanent group whose duty it would be to watch over events in the various countries and to announce to the Political Body any situation, together with recommendations for its treatment, which in the judgment of the group is likely to become acute and to lead to disturbance. The group should consist of selected individuals rather than government appointees, recognized for their wisdom, character and experience. The group should have wide powers for travel and investigation and perhaps for the maintenance of representatives in the various countries to furnish periodic reports of conditions.'

an international official and therefore not open to the same embarrassment as the Ministers of individual states, should be empowered to bring before its members, on his own initiative, any potentially dangerous development at an early stage before the aggressor has time to gird himself for war. . . .¹ In the same year, the State Department's planning group produced the first of the series of constitutional drafts, the last of which was to be placed before the Powers at Dumbarton Oaks. While this 'Draft Constitution of International Organization' did not contain the substance of an Article 99 in terms, the Secretary-General was designated as permanent chairman of the proposed Executive Committee and of the Council, and was empowered, in the event of a breach or threatened breach of the peace, to request the parties 'to desist from any action which would further aggravate the situation' and to 'forthwith summon a meeting of the Council'.² His powers thus were to embrace and surpass those ultimately to be allotted to him by Article 99.

The Department's second draft went farther. The Director-General (as the Secretary-General was called at this stage) would preside over the Council and participate in its deliberations without the right to vote as well.³ Moreover, it was provided that states failing to comply with the Director-General's request to desist from any action which might prejudice a peaceful settlement of a breach or threat of breach of the peace 'shall be regarded as intending a breach of the peace,' and that 'the Council shall forthwith institute such measures, including measures of force, as it deems appropriate. . . .'⁴

The third draft proposal in Washington, the 'Possible Plan for a General International Organization' went farthest in that direction.⁵ According to that plan there would be two permanent international officials, the President and the Director-General. The latter would confine himself to administrative functions.⁶ The President, 'a person of widely recognized eminence',⁷ would preside over the executive council,⁸ and perform such other duties of a 'general political character' as were entrusted to him by the general

¹ 'If the noble Earl, Lord Perth, had enjoyed this power as Secretary-General of the League,' Lord Cranborne continued, 'the history of the League might have been a very different one' (House of Lords, *Parliamentary Debates*, Official Report, 5th Series, vol. cxxvii, 15 April 1943, p. 249). In the same debate, Viscount Cecil of Chelwood, who proposed the procedure upon which Lord Cranborne comments, twice emphasized the desirability of something in the nature of an Article 99 (*ibid.*, 14 April, p. 182; 15 April, pp. 255-6).

² Draft of 14 July 1943, reproduced in *Policy Preparation*, Appendix 13, pp. 475, 476, 478.

³ 'The Charter of the United Nations' (Draft), 14 August 1943, *ibid.*, Appendix 23, p. 528.

⁴ *Ibid.*, Appendix 35, p. 590.

⁵ Of 29 April 1944; *ibid.*, Appendix 35, pp. 582-91.

⁶ *Ibid.*, p. 590.

⁷ *Ibid.*

⁸ *Ibid.*, p. 586. The International Civil Aviation Organization follows this pattern of two permanent officers. There is a President of the Council, who presides over I.C.A.O.'s executive organ, and a Secretary-General, who acts as the Organization's chief executive officer (*Convention on International Civil Aviation*, Articles 51, 54, 59, 60). The desirability of entrusting the chairmanship of the main political organ of the world organization to either the Secretary-General or to an officer analogous to the President who would serve with the Secretary-General is discussed in Royal Institute of International Affairs, *The International Secretariat of the Future* (1944), pp. 32-33.

The Secretary-General of the United Nations, in the person of the Director of the Political Division of the Department of Security Council Affairs, has presided over governmental subcommittees of the Interim Committee of the General Assembly. The contribution of the Secretariat to the work of these subcommittees was acknowledged by the Interim Committee (see Parry, 'The Secretariat of the United Nations', *World Affairs*, July 1950, p. 362).

The *Articles of Agreement of the International Bank for Reconstruction and Development* (Article V, section 5) and the *Articles of Agreement of the International Monetary Fund* (Article XII, section 4) provide that the chiefs of their operating staffs shall be respectively President and Managing Director of their executive bodies.

assembly or by the executive council.¹ In the event that a threat to the peace or breach of the peace should occur, the council 'should immediately be convened by the Chairman [President] who should be empowered also to initiate such emergency measures as may be necessary, subject to review by the council when it resumes session'.²

However, the 'Tentative Proposals for a General International Organization' which the United States evolved on the eve of the Dumbarton Oaks conversations reduced the proposed political authority of the Secretary-General to its nadir.³ There would be no President, and the Director-General, far from presiding over the Council or having emergency powers to act in the Council's name, was to be denied the right to bring to the Council's attention matters which in his opinion threatened the peace.⁴ Finally, the United States appears to have revised its views concerning the powers of the Secretary-General a fifth time, by proposing⁵ the addition of what later came to be designated as Article 99.⁶ The right of the Secretary-General to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security was in fact agreed upon without much difficulty by those participating in the Dumbarton Oaks Conference.⁷

These American drafts, being in the nature of *travaux préparatoires* twice removed from the Charter, would seem to have tenuous legal force, but they are instructive in so far as they shed light upon the intent of the prime drafter of the treaty from which the powers of the Secretary-General flow. They are of especial interest because the record of the Dumbarton Oaks discussions, to the limited extent that one exists,⁸ is unpublished, and because the consideration of Article 99 at San Francisco did not come to grips with the essentials of the article. The express political powers of the Secretary-General, as envisaged in these early statements and drafts, would seem to be of alternative classes, the second of which encompassed the first. The purpose of Article 99 thus conceived is not to create in the Secretary-General an officer who will preside over and lead the discussions of the council, but rather to secure an impartial watchdog, an agent who will bring to the attention of the organization threats to the peace which Member states, because of political considerations, will tend to be hesitant in raising. Alternatively, three of the State Department drafts enable, in varying degrees, the chief permanent international official not only to summon purposeful meetings of the council on his own initiative (the essence of Article 99), but empower him to preside over the council, to admonish states threatening the peace, and to perform duties of a general political character—duties which may extend so far as to an emergency activation of the processes of collective security in the council's name. Either to give to the Secretary-General these latter imposing powers, or no express political powers at all—these appear to have been the conflicting tendencies within the State Department. The conflict apparently was resolved by reviving the intermediate solution of an Article 99. While the inaccessibility of any Dumbarton Oaks records precludes a confident estimate, the pattern of pre-Dumbarton Oaks thinking, together with the interpretation of Article 99 later advanced by the United States representative in the course of the

¹ *Policy Preparation*, p. 590.

² *Ibid.*, p. 588. These emergency measures seem to have included the employment of armed forces which earlier would have been placed at the Council's disposition (*ibid.*).

³ Of 18 July 1944; *ibid.*, Appendix 38, pp. 595-606.

⁴ *Ibid.*, p. 605.

⁵ See Schwebel, *op. cit.*, p. 18.

⁶ Dumbarton Oaks, 'Proposals for the Establishment of a General International Organization', reproduced in *Policy Preparation*, 7 October 1944, Appendix 43, p. 619.

⁷ See Schwebel, *op. cit.*, p. 18.

⁸ *Policy Preparation*, pp. 306, 309, 311, 331.

discussions of the Committee of Experts of the Security Council,¹ would perhaps seem to indicate that the United States foresaw the application of Article 99 in terms, and did not intend the article to invest the Secretary-General either with a broad participatory role in Security Council proceedings or with general political authority. The role of the Secretary-General in practice has developed in a manner precisely contrary to this seeming intention.²

The debate at San Francisco over Article 99 was confined to three questions: whether its invocation should be a matter of the Secretary-General's right or a prescription of duty; whether its application should extend to the General Assembly or be restricted to the Security Council; and whether, in addition to matters threatening international peace and security, the Secretary-General should be empowered to draw the Organization's attention to 'any matters which constitute an infringement or violation of the principles of the Charter'.³

There was some sentiment in favour of imposing upon the Secretary-General as a duty the implementation of Article 99. A motion was offered which would have changed the article to read, 'The Secretary-General shall bring to the attention of the Security Council', instead of 'may bring'. The majority, however, preferred that the exercise of Article 99 be a matter of the Secretary-General's discretion, and the motion was then withdrawn.⁴ There may be said to flow from the discretionary nature of the article which was thus affirmed not only the evident option either to invoke or not to invoke Article 99, but, further, the Secretary-General's right to choose the precise means of implementing the article. As a matter of strategy, the Secretary-General may exert his influence so that it will not be necessary for him formally to bring the matter in question to the attention of the Security Council. Article 99, in other words, may be interpreted as providing a specific legal authorization for that extensive, informal, behind-the-scenes political activity of the Secretary-General for which the propensities of his position, and the precedent of the League, provide a non-textual basis. The option of attributing certain of that activity more or less directly to the text of the Charter may prove valuable to a Secretary-General in some contingencies.

It was further proposed that Article 99 be broadened to give to the Secretary-General the right to bring matters within its compass before either the General Assembly or the Security Council or both.⁵ An amendment to this effect was voted down for a variety of slight reasons.⁶ Its defeat has turned out to be of little consequence, however, for the Secretary-General was subsequently accorded by the rules of the General Assembly the right to add to the provisional agenda 'all items which [he] deems it necessary to put before the General Assembly'.⁷ The Secretary-General has, not unreasonably, interpreted 'all items' to include political and security items.⁸ This

¹ *Infra*, p. 377, and Schwebel, *op. cit.*, pp. 21-23, 84-87, 253. The United States representative in the Committee of Experts in these discussions, Mr. Joseph E. Johnson, participated in the Dumbarton Oaks negotiations (*Policy Preparation*, p. 303).

² See Schwebel, *op. cit.*, pp. 85-117.

³ United Nations Conference on International Organization (U.N.C.I.O.), *Documents*, vol. 7, pp. 162-3, Committee I/2, 17th meeting.

⁴ *Ibid.*, p. 556, draft report of Subcommittee I/2/D.

⁵ *Ibid.*, p. 162, Committee I/2, 17th meeting.

⁶ See *ibid.*, pp. 168-9, Committee I/2, 18th meeting; Goodrich and Hambro, *The Charter of the United Nations* (1949), p. 502; and Schwebel, *op. cit.*, p. 20.

⁷ General Assembly, *Rules of Procedure*, Doc. A/520, rule 12.

⁸ For example, the Secretary-General offered for the agenda of the Fifth Session his 'Memorandum of Points for Consideration in the Development of a Twenty-Year Program for Achieving Peace through the United Nations'—a highly political item which included such matters as atomic control and periodic meetings of Foreign Ministers.

interpretation places the Secretary-General in a position *vis-à-vis* the Assembly comparable to that which he enjoys in relation to the Security Council by virtue of Article 99. For apparently the Secretary-General may add to the Assembly's provisional agenda any matter which he might, by the terms of that article, draw to the Council's attention. The Secretary-General's Assembly agenda rights would not seem to equate wholly with those he enjoys under Article 99, however. For the Security Council has, at least according to the Charter, 'primary responsibility'¹ in security matters. It is, moreover, more likely that the General Assembly might decline to take up a security item submitted by the Secretary-General than that the Security Council would so decline; for the Secretary-General's raising of a matter before the Security Council is rooted in an explicit Charter authorization to which the Security Council must pay due respect. Furthermore, a matter raised under Article 99 would tend to draw more attention than another political item submitted for the Assembly's crowded schedule.²

Lastly, it was proposed that Article 99 be amended so as to endow the Secretary-General with authority to raise matters which would not necessarily threaten the peace, but which would constitute violations of the principles of the Charter. Iran and Egypt were prominent in backing this Uruguayan amendment, which viewed the Secretary-General as the agent who would bring to the Organization's attention domestic infringements of the Charter's principles. The United Kingdom, Canada, and New Zealand led the majority opposition to this proposal: it would, they held, give to the Secretary-General a wider authority than had been given to the members in this respect, and, the more so in view of the 'very heavy burdens' already placed upon him, would put the Secretary-General in a 'very difficult position'.³ The Uruguayan amendment, which, had it been adopted, would have profoundly modified the Charter, failed by only three votes.⁴ The significant degree of support which such an extreme proposal mustered illustrates the desire widespread at San Francisco to invest the Secretary-General with substantial political authority.

The Preparatory Commission moderately extended the official exegesis of Article 99. It was pointed out, in its Executive Committee discussions, that, as regards political disputes, the cases in which the Secretary-General would find it necessary to invoke the article in terms might well be rare. Article 99 was seen to be of 'very great political importance from a broader point of view. The Secretary-General's function encompassed the reporting of *any* developments—for example, in the economic and social field—which in his view could have serious political implications remediable only by political action. In holding this responsibility, the Secretary-General formed a vital link between the various units of the Organization.'⁵ Professor Lauterpacht similarly has drawn attention to the 'considerable potentialities'⁶ which Article 99 presents for bringing before the Security Council violations of human rights so grave that they threaten the maintenance of international peace and security.⁷ Moreover, he notes: 'The clause of

¹ Article 24 (1).

² The provision of Article 98 that 'The Secretary-General shall make an annual report to the General Assembly on the work of the Organization' puts at the disposal of the Secretary-General another medium for bringing matters threatening international peace and security to the attention of the General Assembly.

³ U.N.C.I.O., *Documents*, vol. 7, p. 163, Committee I/2, 17th meeting.

⁴ *Ibid.*, pp. 168-9, Committee I/2, 18th meeting.

⁵ Executive Committee of the Preparatory Commission, Committee 6, 4th meeting, Doc. PC/EX/SEC/9.

⁶ Lauterpacht, *International Law and Human Rights* (1950), p. 187.

⁷ Professor Lauterpacht's restriction of human rights matters which may be raised under Article 99 to those so grave that they may threaten international peace and security is more accurate

domestic jurisdiction of Article 2, paragraph 7, presents no impediment in the way of the exercise of this particular function of the Secretary-General. The matters referred to in Article 99 are not, by definition, essentially within the domestic jurisdiction of any State.¹

A last source of early governmental commentary upon Article 99 is the meetings of the Committee of Experts of the Security Council which were held in May 1946 to consider, *inter alia*, the rights of intervention, on the part of the Secretary-General, in the Council's proceedings. In proposing an unrestricted right of intervention by the Secretary-General, the Soviet representative 'pointed out the difference in the conception of the powers accorded the Secretary-General of the United Nations as opposed to those accorded the Secretary-General of the League. . . . Specifically, he noted the additional powers given the Secretary-General under Article 99.'² In reply, the representative of the United States doubted 'whether the Secretary-General had the right to draft specific resolutions and proposals under Article 99'.³ But he emphasized his

than the looser characterization of the Preparatory Commission: developments which, in the Secretary-General's view, 'could have serious political implications remediable only by political action'. It should be noted, however, that the matters referred to in Article 99 are matters of the Secretary-General's appreciation ('The Secretary-General may bring . . . any matter which in his opinion . . .'); and that the norm to which he must conform is flexible. The determination of what is a threat to international peace and security is one susceptible of a considerable variance in judgment. And the Secretary-General's discretion is the broader in that he may raise matters which not only threaten but those which 'may threaten' international peace and security. The wide area of appreciation thus accorded the Secretary-General is further emphasized by the stress upon the value of a procedure like that of Article 99 lying in its affording the means of bringing questions which may threaten the peace to the attention of the organization in their incipency. 'The great thing', Lord Cecil observed, in proposing that the successor to the Secretary-General of the League 'should have a special duty to call the attention of the new authority to any dangers . . . which might exist', 'is to interfere at an early stage; if you wait until war has actually broken out, you will be faced with all kinds of difficulties which may prove overwhelming' (House of Lords, op. cit., 15 April 1943, p. 256. See also the remarks of Lord Cranborne and the State Department memorandum of 1 May 1940, cited *supra*, p. 372). Evidently, situations in their incipency may take a variety of paths, which in the end do not threaten the peace; such paths are not open to a full-blown dispute which, if it is to be a threat, would probably be one at the outset.

Nevertheless, while the Secretary-General necessarily would seem to have broad latitude in his appreciation of which matters, in his opinion, may threaten international peace and security, the Security Council may decline to pursue a question which the Secretary-General brings to its attention under Article 99, whether or not his action in raising it objectively is consonant with the strictest interpretation of the terms of Article 99. The Secretary-General may do no more than place the matter on the Council's provisional agenda and argue, if need be, for the Council's adoption of the item for its working agenda (Security Council, *Rules of Procedure*, Doc. S/96/Rev. 3, rules 22, 6; rule 3 provides that the President of the Council must call a meeting of the Council if the Secretary-General wishes to invoke Article 99). The Security Council remains the master of its working agenda. However, its members would in law be required to consider their response to the Secretary-General's action in the light of their obligations under Articles 2, paragraph 2, and 24, paragraph 2.

The discretionary aspects of Article 99, in so far as they concern the Secretary-General's appreciation of which matters may threaten international peace and security, are not to be confused with that discretionary element which comes into play after the Secretary-General has decided that a matter may constitute a threat under Article 99. At this latter point, it is still for the Secretary-General to decide whether he will formally invoke the article, or take other or no action.

¹ Lauterpacht, op. cit., p. 187. The rejection at San Francisco of the Uruguayan amendment does not derogate from Professor Lauterpacht's conclusion, for the domestic infringements of the Charter's principles which the Uruguayan amendment would have empowered the Secretary-General to bring to the Organization's attention were those which would *not* threaten the peace.

² Summary Record of the 47th meeting of the Committee of Experts, Doc. S/Procedure/100.

³ The United States delegate was 'not at all sure that the Charter can be construed as authorizing the Secretary-General to make comments on political and substantive matters' (Doc. S/Procedure/103).

'Government's interest in building up the strength of the Secretary-General within the provisions of Article 98'¹ (which speaks of the 'capacity' in which the Secretary-General shall act in his relations with the Security Council). The American suggestion that the Committee's discussions did no more than establish 'the minimum rules on the basis of which the Secretary-General's role could be developed in practice' and did not constitute a 'definitive definition' of his rights under Article 99 was agreed to without difficulty.²

A number of interlocking powers flowing from Article 99 and its official exposition may at this point be distinguished. First of all, there is the evident authority of the Secretary-General to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. In this, when taken together with Article 98, the position of the Secretary-General may be said to approximate to that of a twelfth member of the Security Council, without veto or vote. Or his situation may be likened to that of a Member state under Article 35, which may similarly have placed on the provisional agenda of the Security Council (or of the General Assembly) any dispute, or any situation which might lead to international friction or give rise to a dispute. In fact, the Secretary-General's prerogative here extends farther, for he may place 'any matter' on the provisional agenda of the Security Council,³ not just any dispute or situation. And, though the Secretary-General, like a state, can place a question on the Council's provisional agenda only, it seems improbable that the Security Council would refuse to take up an item submitted by the Secretary-General under Article 99. But the Council has been known to reject items placed on its provisional agenda by a Member state. The Secretary-General's authority may be further compared with that of the General Assembly, which 'may call the attention of the Security Council to situations which are likely to endanger international peace and security'.⁴

These parallels notwithstanding, the formal application of the Secretary-General's literal rights under Article 99 would seem to be of limited importance. In United Nations practice (as contrasted, perhaps, with that of the League), states have been far from hesitant in haling other states before the Security Council (though the authority of the Secretary-General to raise matters which states might be reluctant to raise appears to have been a factor in impelling the submission of certain matters to the Council).⁵ The occasions upon which the Secretary-General will be led formally to exercise his powers under Article 99 promise to be few. So far, Article 99 has been expressly invoked but once (on the occasion of the outbreak of hostilities in Korea). And in this case it was in fact the United States rather than the Secretary-General that initially drew the crisis to the attention of the Security Council. Moreover, the influence which the Secretary-General may exert by invoking the article evidently is severely restricted by the fact that his authority is of a moral rather than political nature. Yet, in some circumstances, an appeal by the Secretary-General to the Security Council might well have considerable effect upon world public opinion, and, indeed, his action in the Korean case may have influenced the members in their disposition of it.⁶

¹ Doc. S/Procedure/103.

² The Secretary-General, as a result of these discussions, was accorded broad rights of intervention in the proceedings of the Security Council (*Rules of Procedure*, Doc. S/96/Rev. 3, rule 22).

³ And upon the provisional agenda of the General Assembly as well, by virtue of its Rules of Procedure.

⁴ Article 11, paragraph 3.

⁵ See Schwebel, *op. cit.*, pp. 87-88.

⁶ It has been suggested that the Secretary-General's statement to the Security Council of

Article 99 perhaps is more important as the prime and unmistakable affirmation of the true character of the office of Secretary-General. The power it confers, taken together with the Secretary-General's position as the chief permanent officer of the United Nations and as the individual who 'more than anyone else . . . stand[s] for the United Nations as a whole',¹ constitutes, particularly when blended with Article 98, the legal basis for the Secretary-General's political authority. The discretionary nature of Article 99, as has been pointed out, allows the Secretary-General to attribute much of his extensive diplomatic activity to the implications of the Charter's text.

It may be argued that Article 99, furthermore, may be called into play as the authorizing clause of declarations, opinions, proposals, and resolutions which the Secretary-General may wish to offer in connexion with the Security Council's work. Of the large number of interventions by the Secretary-General to date, the proposal implied in his statement to the Council of 25 June 1950 on the Korean question is clearly within the ambit of Article 99. The express citation of Article 99 as the basis of the more boldly political participation of the Secretary-General in the proceedings of the Security Council, with regard to his submitting opinions,² proposing resolutions, and the like, is largely a virgin field of influence which the Secretary-General might, if the need arises, find himself capable of exploiting. The range of such activity, moreover, would embrace those economic, social, and human rights areas which have been seen to fall within the compass of Article 99.

Lastly, it may be assumed that the Secretary-General will choose to exercise his powers under Article 99 only upon the basis of full and impartial data concerning the matter in point. From this assumption it follows that the Secretary-General has the right to make such inquiries and investigations as he may think necessary in order to determine whether or not to invoke his powers; in fact, his assertion of this right in the course of Security Council proceedings has been unchallenged and generally acknowledged. In September 1946, in the course of the Council's consideration of the Greek question, the United States proposed 'that the Security Council . . . establish a commission of three individuals to be nominated by the Secretary-General, to represent the Security Council on the basis of their competence and impartiality, and to be confirmed by the Security Council' to investigate the facts of the Greek frontier situation. The discussion, a moment later, proceeded as follows:

'The Secretary-General: Just a few words to make clear my own position as Secretary-General and the rights of this office under the Charter. Should the proposal of the United States not be carried, I hope that the Council will understand that the Secretary-General must reserve his right to make such enquiries or investigations as he may think necessary, in order to determine whether or not he should consider bringing any aspect of this matter to the attention of the Council under the provisions of the Charter.

25 June 1950 'probably resulted in winning the votes of India and his native Norway for the cease-fire resolution' (Hamilton, 'The United Nations and Trygve Lie', in *Foreign Affairs*, 29 (1950), No. 1, p. 68).

¹ Preparatory Commission, *Report*, Doc. PC/20, p. 87.

² The Secretary-General submitted a legal opinion on the purported withdrawal of the Iranian question from the Security Council's agenda in April 1946, which was in effect deprecated by the President of the Security Council. In reply, the delegate of the U.S.S.R. stated that the functions of the Secretary-General 'are more serious and more responsible than has been suggested just now. It is sufficient to refer to one article of the Charter in order to come precisely to this conclusion regarding the very great responsibility incumbent upon the Secretary-General. Article 99 . . . The Secretary-General has all the more the right, and moreover the duty, to submit reports on the various aspects of questions that are being considered by the Security Council' (Security Council, 33rd Meeting, Doc. S/P.V./33).

'The President: As the representative of the Union of Soviet Socialist Republics . . . I think that Mr. Lie was right in raising the question of his rights. It seems to me that in this case, as in all other cases, the Secretary-General must act'¹

There was no challenge of the Secretary-General's statement from any quarter, although his affirmation of his investigatory authority was particularly far-reaching in that it claimed not merely the right to make inquiries or investigations without authorization from United Nations organs, but the right to initiate such investigations even in a case where the Security Council has decided not to look into the matter. The importance of this possibility is increased by the fact that a proposal to the Council to investigate a dispute or a situation seems to be subject to the veto.²

Of the greatest consequence to the development of the Secretary-General's powers is his statement to the Security Council of 25 June 1950 on the Korean question, when, 'for the first time', Mr. Lie later formally affirmed, 'I invoked Article 99 of the Charter'.³ When the Council met in emergency session, the President called upon the Secretary-General, first of all, for the purpose of his delivering any 'interim reports on the present situation' which he might have received from the United Nations Commission in Korea.⁴ Mr. Lie took this opportunity to declare, before the members had stated the policies of their Governments, that:

'It [is] plain that military actions have been undertaken by North Korean Forces. These actions are a direct violation of the Resolution of the General Assembly [reaffirming the

¹ Security Council, 70th Meeting, Doc. S/P.V./70, 20 September 1946.

² Professor Kelsen declares: 'It might be doubted whether this interpretation [the affirmation of the Secretary-General's authority to make an investigation under Article 99 after the Security Council has refused to investigate the matter under Article 34] corresponds to the intention of the framers of the Charter' (Kelsen, *The Law of the United Nations* (1950), p. 304). The Charter would appear to bear out Professor Kelsen to the extent that Article 34 endows the Security Council with investigatory powers, while the Secretary-General, who likewise must decide for his purposes whether a matter may threaten international peace and security, is nowhere explicitly granted any investigatory authority. However, the *travaux préparatoires* of the pre-Dumbarton Oaks period pointedly envisage that the Secretary-General be endowed with wide investigatory rights (*supra*, p. 372); and later preparatory work of greater legal relevance appears to throw no light upon the question (Professor Kelsen gives no citation of the source of his impression of the intention of the framers of the Charter). On the face of it, it is not unreasonable to suppose that, on the contrary, the framers foresaw that the Secretary-General would wish to take so profound a step as invoking Article 99 only upon the basis of complete and objective data gathered, if need be, through his own investigations. It is difficult to see why the Secretary-General's investigatory authority would not extend to a matter which the Security Council had declined to investigate; for the essence of Article 99 lies in its providing an agent of the Organization as a whole who will raise those matters which, though they may constitute a threat to the peace, states find it impolitic to raise or to pursue; and particularly in such delicate cases the Secretary-General may not wish to take the initiative without full and impartial data at his disposal. The Soviet endorsement of the Secretary-General's assertion of such powers seems unqualified. The United States, in speaking of the 'unprecedented political responsibilities' entrusted to the Secretary-General by Article 99, may also be said to have subscribed in some degree to the investigatory authority of the Secretary-General: 'We need not await its [Article 99's] full implementation to recognize that the power of the Secretary-General to study conditions which in his opinion threaten the peaceful relations of the United Nations, and to make recommendations based on these findings, represents a significant departure from the usual concepts of international organization and national sovereignty' (Mr. Warren Austin, in an address to the General Assembly, *Official Records of the Second Part of the First Session of the General Assembly*, Plenary Meetings, p. 902).

³ Address to the General Assembly of 28 September 1950, *Official Records of the Fifth Session of the General Assembly*, Plenary Meetings, p. 176.

⁴ Proceedings of 25 June 1950, 43rd Meeting of the 5th Year, Security Council, *Official Records*, No. 15.

South Korean Government as the country's lawful régime and extending the life of the Korean Commission] . . . as well as a violation of the principles of the Charter.

'The present situation is a serious one and is a threat to international peace. The Security Council is, in my opinion, the competent organ to deal with it.

'I consider it the clear duty of the Security Council to take steps necessary to re-establish peace in that area.'¹

The Secretary-General apparently considered this statement to be an invocation of Article 99 despite the fact that the emergency session of the Council was called not upon his initiative, but upon that of the United States.² It would seem that the United States, by requesting the meeting of the Council expressly to consider the Korean breach of the peace, first drew the Korean crisis to the Council's attention. It is submitted that the Secretary-General's declaration was clearly in the spirit of Article 99. Mr. Lie appeared to regard it as also having been in accordance with the letter of Article 99, apparently on the ground that his drawing the Council's attention to a matter may constitute an appeal to that article, even if his action supplements the earlier raising of the same issue by a Member state. In describing his declaration of 25 June as relying on Article 99, the Secretary-General thus seems to define the article as admitting supplementary, and perhaps joint, as well as exclusive, action. While this interpretation is not unreasonable, it does not appear to be the one anticipated by the Preparatory Commission,³ nor does it find support in the *travaux préparatoires*. However, the distinction is of limited practical importance, while the Secretary-General's statement, whether invoking that article or not, seems to have been of considerable practical effect.

The circumstances of the Secretary-General's Korean intervention illustrate a paradoxical quality inherent in the entrusting of political prerogative to the international secretariat. The Secretary-General, who is responsible to and representative of the Organization as a whole, and who must avoid identification with interests more limited than those of the Organization as a whole, is at the same time given a power the exercise of which may tend to bring him into conflict with those policies of Member states which constitute (directly or through their support of non-member states) a threat to the peace. Thus while the Secretary-General may be in a higher sense impartial in the carrying out of his political duties, he cannot be neutral. Neutrality implies political abstinence, not political action, and, in certain circumstances, such as the Korean, might well keep the Secretary-General from conscientious fulfilment of his Charter obligations. There is, indeed, an 'un-neutral' predisposition about the Secretary-General's calling the attention of the Security Council to a matter threatening the peace, since it is unlikely that it can ever be in the equal interests of the parties to a dispute, in an exact, strictly 'neutral' degree, that a situation in which they are involved be brought before the Council. The unequivocal character of the Secretary-General's intervention in the Korean case emphasizes this at least superficially partisan potentiality of Article 99.

The implementation of Article 99 has not been confined to the Korean question. In so far as the article comprises the greater part of the express affirmation of the Secretary-General's political authority, the article may be said to be in fact 'self-operating': even when not formally invoked, its presence provides the likeliest legal source for the continuing political initiative of the Secretary-General, which takes forms other than the implementation of Article 99 in terms.

¹ Ibid.

² Ibid., and Doc. S/1495.

³ Doc. PC/EX/SEC/9.

Thus Article 99 has been invoked publicly on one occasion, apparently with effect (though in a fashion ancillary to the action of a Member state); and it has acted as a reserve force inducing states which otherwise might not have submitted questions to the Security Council to raise them. But the influence of Article 99 may be said to have extended farther than that. For that article has flavoured and fortified the whole of the Secretary-General's political endeavour. Article 99 has set the tone of the office of Secretary-General; it has provided the constitutional base for a structure of varied and significant political activity. In this, Article 99 is of considerable, and may prove to be of very great, importance. Perhaps it is not too much to suggest that, as the development of the great national civil services profoundly affected the national histories of the nineteenth and twentieth centuries, so the growth of the powers of the international executive may in time influence the future course of world affairs.

S. M. SCHWEBEL

THE MUNICIPAL AND INTERNATIONAL LAW BASIS OF JURISDICTION OVER WAR CRIMES

THE International Law Commission of the United Nations has recently defined war crimes as all 'acts in violation of the laws or customs of war'.¹ In so far as the definition departs from the view that only 'grave breaches' of the law of war are war crimes,² the statement is meaningful, but the equating of war crimes with violations of the law of war otherwise merely restates the problem, which is essentially: What acts in warfare are violations of international law? There is a category of conduct which has often in the past been loosely referred to in terms of international law but which is actually not internationally criminal in the sense that a prescription of international law requires its punishment. There remain those acts, comprising for the most part cruel and inhuman treatment of prisoners of war, the sick and wounded, and civilian populations, which are universally recognized as war crimes in the proper sense of the word. An examination of the different theories under which states have prosecuted war crimes may thus not only assess the function of international law in dealing with violations of the law of war, but also serve as a basis for defining those violations themselves.

1. *International and municipal law applied to war crimes*

The great cleavage in the prosecution of war crimes has been between the practice of charging suspected war criminals with violation of international law and the process of prosecuting such persons under municipal law for offences defined by the ordinary criminal law. A common feature of charges presented before British military courts, convened in conformity with the Royal Warrant of 14 June 1945,³ and United States military tribunals, other than those constituted pursuant to Control Council Law No. 10,⁴ was a simple averment that the acts alleged to have been committed by the accused were in 'violation of the laws and usages [or customs] of war'.⁵ Although it has some-

¹ Article 2 (11), Draft Code of Offences against the Peace and Security of Mankind, *Report of the International Law Commission Covering its Third Session*, 16 May-27 July 1951 (U.N.Doc. A/CN. 4/48, 30 July 1951), para. 59.

² But cf. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', in this *Year Book*, 21 (1944), pp. 78-79.

³ Army Order 81/45; see *War Crimes Reports*, vol. i (1947), p. 105.

⁴ 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 22, p. 22.

⁵ *In re Schonfeld et Al.* (1946), *War Crimes Reports*, vol. xi (1949), p. 64, and *In re Killinger et Al.* (1945), *ibid.*, vol. iii (1948), p. 67, are representative of British practice; for charges presented to American tribunals see, for example, *United States v. Eisentrager et Al.* (1947), *ibid.*, vol. xiv (1949), p. 8, *United States v. Sawada et Al.* (1946), *ibid.*, vol. v (1948), p. 1.

times been said that American practice in this respect was the result of a transformation of international law into municipal law,¹ it does not appear that the courts of the United States have been so sophisticated as to allege that they were applying international law while covertly invoking municipal law. The Supreme Court of the United States, while disclaiming any intention to 'make' international law, has plainly stated that it enforces it,² and statements concerning the role of statutes in making this possible have placed emphasis on the fact that the effect of Congressional enactments has been to bring violations of the laws and customs of war within the jurisdiction of certain designated courts.³ The manner in which jurisdiction has been conferred on military courts of the Commonwealth, including the United Kingdom, Canada,⁴ and Australia,⁵ has given even less basis for the extreme claims of the dualists. Judges Advocate and Legal Members, with rare exceptions, scrupulously dispelled any illusions created by counsel that the accused were being tried for offences defined by the municipal law of the country concerned and made clear that distinctions like that between murder and manslaughter were not relevant.⁶ Analogies offered by domestic law, however, often proved helpful in areas wherein no relevant principles of international criminal law had yet been developed.⁷

In striking contrast to Anglo-American practice was that generally prevailing in France and some other countries. Not long after the invasion of France in 1944, a French ordinance was promulgated providing for the punishment of acts which were not justified by the laws and customs of war and constituted violations of existing French law.⁸ Certain provisions of the *Code Pénal* and of the *Code de Justice Militaire* were, by the terms of the Ordinance, interpreted in such a fashion as to apply to the war crimes to which they bore some resemblance. The forced labour of civilians, the improper employment of prisoners of war, and deportation were, for example, considered as *séquestration* within the meaning of Articles 341-4 of the *Code Pénal*.⁹ The law acted on both a territorial and a protective¹⁰ basis, for both crimes committed on French territory and crimes against French nationals and persons associated with French interests fell within the terms of the Ordinance. The effect of this legislation was to require two stages in the proof of a given offence, the first being a demonstration that the act was not lawful under international law and the second that the act was

¹ Schwarzenberger, 'The Problem of an International Criminal Law', in *Current Legal Problems*, 3 (1950), p. 270.

² 'We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution' (*In re Yamashita* (1946), 327 U.S. 1, 16; see also *Ex parte Quirin et Al.* (1942), 317 U.S. 1, 27).

³ *Ex parte Quirin et Al.* (1942), 317 U.S. 1, 26, 35; *In re Yamashita* (1946), 327 U.S. 1, 7.

⁴ Act respecting War Crimes (10 Geo. VI, c. 73): see *In re Meyer* (1945), *War Crimes Reports*, vol. iv (1948), p. 97, for a typical charge.

⁵ War Crimes Act, 1945 (Act No. 48, 1945); Regulations under the War Crimes Act, 1945 (S.R. No. 164 of 1945 and S.R. No. 30 of 1946).

⁶ *In re Eck et Al.* (1945), *War Crimes Reports*, vol. i (1947), p. 1; *In re Heyer et Al.* (1945), *ibid.*, p. 88; cf. the Australian cases of *In re Kudo et Al.* (1946) and *In re Yamasaki* (1946), referred to in *ibid.*, vol. xv (1949), p. 8.

⁷ *In re Killinger et Al.* (British Military Court, Wuppertal, 1945), *War Crimes Reports*, vol. iii (1948), p. 67; *In re Heering* (British Military Court, Hanover, 1946), *ibid.* vol. xi (1949), p. 79; *United States v. Back* (1945), *ibid.*, vol. iii (1948), p. 60.

⁸ Ordonnance du 28 août relative à la répression des crimes de guerre, *Journal Officiel de la République Française*, 30 August 1944, p. 780.

⁹ Article 2, paras. 5 and 6.

¹⁰ In the sense of protection of the security of the state, as envisaged by Article 7, Draft Convention on Jurisdiction with Respect to Crime of the Harvard Research, in *American Journal of International Law*, 29 (1935), Supp., p. 439.

prohibited by the relevant provisions of the *Code Pénal* or the *Code de Justice Militaire*.¹ Crimes of the foregoing nature were tried before French Permanent Military Tribunals, while certain crimes not directed against French nationals or the other persons mentioned in the Ordinance of 1944 or taking place on French territory were tried by French occupation courts in Germany, acting in conformity with Control Council Law No. 10.² On the basis that international law was not operative in Norway until incorporated into municipal law by legislative action, that country similarly provided in its law relating to war crimes³ that acts forbidden by the Norwegian criminal law which had been committed against Norwegian nationals or interests or in Norway and were in violation of the laws and customs of war could be tried according to Norwegian law. As originally applied, the Netherlands law, promulgated in the Extraordinary Penal Law Decree of 22 December 1943,⁴ followed the continental pattern by providing for the punishment of war crimes under local law, as supplemented by two further articles of the Decree. However, in *Re Ahlbrecht*,⁵ the Special Court of Cassation, in quashing on jurisdictional grounds the sentence imposed on a war criminal, held that jurisdiction attaches with respect to war crimes only to those individuals who had violated the laws and customs of war and that Dutch penal law could not be said to be applicable to all German soldiers who could not show that some positive rule of international law afforded justification for their acts. The Court also criticized the attempt which had been made in the Decree to squeeze war crimes into the categories of domestic penal law. As a result the Extraordinary Penal Law Decree was amended in 1947⁶ to make punishable war crimes and crimes against humanity as defined by the Charter of the International Military Tribunal at Nuremberg, while requiring that the punishment imposed should not exceed that provided for the same or most closely analogous act under the law of the Netherlands.

The theory upon which war criminals were tried by France, Norway, and initially by the Netherlands for offences against municipal law was grounded on the assumption that enemy soldiers enjoy an immunity from the criminal law of the state against which

¹ Representative instances are: *In re Bommer et Al.* (1947), *War Crimes Reports*, vol. ix (1949), p. 62; *In re Baus* (1947), *ibid.*, p. 68; *In re Szabados* (1946), *ibid.*, p. 59; *In re Holstein et Al.* (1947), *ibid.*, vol. viii (1949), p. 22. In *Re Wagner et Al.* (1946), *ibid.*, vol. iii (1948), p. 23, one of the issues presented to the Court of Cassation was whether the failure to put to the military judges specific questions concerning the legality or illegality under international law of the acts charged had resulted in a failure to resolve an essential issue in the proceedings. The Court held that separate questions as to this matter were not necessary, as they were inherent in questions concerning the guilt of the accused. Apparently in *Re Lex* (1946), *ibid.*, vol. vii (1948), p. 74, the accused, a German civilian charged with instigating the deportation of French families and the looting of their property, was convicted of the offence of 'atteinte à la sûreté extérieure de l'État' under Article 79 of the *Code Pénal* without reference to the 1944 Ordinance and thus presumably under the ordinary French municipal law alone.

² See *War Crimes Reports*, vol. iii (1948), p. 100. French Military Government Courts had jurisdiction over the offences defined in Control Council Law No. 10.

³ Law of 13 December 1946 (No. 14) on the Punishment of Foreign War Criminals, *War Crimes Reports*, vol. iii (1948), p. 81.

⁴ *Ibid.*, vol. xi (1949), p. 86. In the Netherlands East Indies, however, war crimes were tried under a decree which set forth an exhaustive listing of war crimes under international law (*ibid.*, p. 91).

⁵ *Na-Oorlogsche Rechtspraak, Tribunalen in Nederland*, 3rd Year, No. 747; see *Grotius International Yearbook, 1940-1946* (1948), pp. 54-56. The Special Court of Cassation stated that international law should not be looked upon as a justification for the acts of a state which had itself disregarded international law in occupying the Netherlands. This view appears to bear out the thesis that the law of war is 'prohibitive law'.

⁶ See *War Crimes Reports*, vol. xi (1949), p. 90.

they fight only so long as they comply with the international law of war.¹ The burden is accordingly placed on the prosecution to prove that there has been a violation of international law such as to destroy the immunity of the accused or on the accused to assert his immunity by demonstrating that his conduct had been sanctioned by some rule of the law of war. In limiting jurisdiction to those offences committed against either nationals or the interests of the state concerned or on the territory of the prosecuting nation, this view tended to emphasize the protection of that state rather than of the international community. As the states which embraced this view had had an experience of enemy occupation which both Great Britain and the United States lacked, it is perhaps not unnatural that recourse should have been had to the convenient instrument of local law rather than to the long arm of the law of nations. In any case, the fundamental assumption that the soldier is exempt from enemy jurisdiction if he complies with international law is not peculiar to continental jurisprudence² and should not be productive of any serious disagreement, although it is less clear on what theoretical basis it may be laid. It may be, as Professor Kelsen asserts, that the act of the soldier who conforms to the law of war and does not engage in private acts of warfare is an act of state depriving the enemy state of jurisdiction,³ or it may be that the humanitarian intervention of international law, which makes the soldier falling into the hands of the enemy not a criminal but a prisoner of war, subject only to prosecution for acts in violation of the law of war, produces that result in time of war.

International instruments defining war crimes and providing procedures for their punishment provide something more of a problem concerning the nature of the law applied by the tribunals thereby established. Neither the Charter of the International Military Tribunal⁴ nor that of the International Military Tribunal for the Far East⁵ specifically alluded to trial under international or municipal law, although war crimes were first defined as 'violations of the laws or customs of war'.⁶ The Judgment of the Nuremberg Tribunal has been variously interpreted. But the Tribunal, by its frequent references to international law, to the treaties governing the conduct of war, to the amenability of individuals to international law, and to the responsibility of individuals under that law,⁷ seems rather to have indicated that the substantive law which it applied

¹ Merle, *Le Procès de Nuremberg et le châtement des criminels de guerre* (1949), p. 145. A similar view is held by a number of American writers, e.g. Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War', in *American Journal of International Law*, 37 (1943), p. 407; Garner, 'Punishment of Offenders against the Laws and Customs of War', *ibid.* 14 (1920), p. 70. But cf. the interesting case of *In re Motosuke* (1948), *War Crimes Reports*, vol. xiii (1949), p. 126, in which a Netherlands East Indies court found a Japanese officer to have killed a member of the Japanese armed forces without sanction in Japanese military law and therefore to have been guilty of a common law offence against the laws of the Netherlands East Indies and not of a war crime.

² *Freeland v. Williams* (1889), 131 U.S. 405. *Coleman v. Tennessee* (1878), 97 U.S. 509, and *Dow v. Johnson* (1879), 100 U.S. 158, imply that a soldier of the occupying army is subject neither to the law nor to the jurisdiction of the courts of the occupied area, whether or not the soldier's act was in conformity with the law of war. See Glueck, *War Criminals, Their Prosecution and Punishment* (1944), p. 43, and cases cited therein, and Finch, 'Jurisdiction of Local Courts to try Enemy Persons for War Crimes', in *American Journal of International Law*, 14 (1920), p. 218.

³ 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', in *International Law Quarterly*, 1 (1947), pp. 160-1; 'Collective and Individual Responsibility for Acts of State in International Law', in *Jewish Yearbook of International Law*, 1 (1948), pp. 230-1.

⁴ Cmd. 6668.

⁵ Special Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946.

⁶ Article 6 (b) of the Nuremberg Charter; Article 5 (b) of the Tokyo Charter.

⁷ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6967 (1946), especially at pp. 38-42.

was international law and not a new internationally enacted system of municipal law. It pointed out that the Charter is 'the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'.¹ In the so-called 'Nuremberg Subsequent Proceedings', the United States Military Tribunals established under Control Council Law No. 10 generally asserted that that law, which established their authority, was merely declaratory of customary international law,² although the Tribunal in the *Justice Trial*³ found it necessary to add, perhaps unnecessarily, that in so far as Law No. 10 might go beyond established principles of international law, authority to enact it was to be found in the sovereign legislative power assumed after the unconditional surrender of Germany. The indictments against persons tried by these courts were drawn in comprehensive fashion and alleged violations of the laws and customs of war, of treaties governing war, of 'the general principles of criminal law as derived from the criminal laws of all civilised nations', and of the internal penal law of the countries where the offences were committed.⁴ Despite the sweeping language of the indictments, the law applied by these tribunals was generally law which was, or purported to be, international law, and it was not necessary to allude to specific provisions of the criminal codes of the countries concerned.

In view of what appears to be the preponderant view in recent prosecutions of war criminals, i.e. that international law is directly applicable to such persons, the position adopted by some of the states represented at the Geneva Conference of 1949 was somewhat startling. Efforts to declare certain acts to be war crimes were strenuously resisted, not only by the delegates of European countries, as might be expected, but by those of the United States and Great Britain as well.⁵ The insistence that what were finally referred to as 'grave breaches'⁶ of the Conventions would not become crimes within the countries concerned until implementing legislation had been enacted is somewhat difficult to reconcile with the accepted Anglo-American view of the nature of war crimes, especially since most of the acts referred to as 'grave breaches' had been punished as war crimes under international law by Commonwealth and American

¹ Cmd. 6964, at p. 38.

² *United States v. Von Leeb et Al.* (1948), *Trials of War Criminals*, vol. xi (1950), p. 476; *War Crimes Reports*, vol. xii (1949), p. 61; *United States v. Krupp et Al.* (1948), *Trials of War Criminals*, vol. ix (1950), p. 1331, *War Crimes Reports*, vol. x (1949), p. 131; *United States v. Flick et Al.* (1947), *ibid.*, vol. ix (1949), p. 16; see Lord Wright, 'War Crimes under International Law', in *Law Quarterly Review*, 62 (1946), p. 41.

³ *United States v. Altstoetter et Al.* (1947), *Trials of War Criminals*, vol. iii (1951), p. 966, *War Crimes Reports*, vol. vi (1948), p. 34.

⁴ A typical indictment stated: 'The said war crimes constitute violations of international conventions, particularly of Articles 4, 5, 6, 7, and 46 of the Hague Regulations, 1907, and of Articles 2, 3, and 4 of the Prisoner-of-War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10' (*United States v. Brandt et Al.* (1947), *Trials of War Criminals*, vol. i (1949), p. 15).

⁵ *Diplomatic Conference of Geneva, Verbatim Report of the Twenty-first Plenary Meeting*, 30 July 1949 (CDG/PLEN/CR. 21), pp. 10, 11. The statement of a United States delegate that 'the term "crimes" is clearly inappropriate to express violations of this Convention, which will not be crimes until they are so made by domestic penal legislation' is particularly striking. This pronouncement echoes a similar view in the Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties of the Paris Peace Conference of 1919, in *American Journal of International Law*, 14 (1920), p. 127, at p. 141.

⁶ Article 51, Wounded and Sick Convention; Article 130, Prisoners of War Convention; Article 147, Civilians Convention.

tribunals during the preceding four years. An opportunity to take a forthright stand on the primacy of international law was thus lost.

2. *War crimes and the part of international law*

It cannot be denied that on several practical grounds the trial of war criminals under national law has certain advantages. Provided the resemblance between the war crime and the ordinary crime under municipal law was close, courts were able to apply a law which was not only familiar but also possessed a high degree of certainty by contrast with the undeveloped state of the international law relating to war crimes. War criminals were, furthermore, tried under the same system of law as were so-called collaborationists, from whom they often differed only with respect to nationality and allegiance. It is true as well that municipal law also provided a *lex* to satisfy the demand of *nullum crimen sine lege*,¹ but the novel interpretations which were read into existing military and criminal codes by legislative or judicial action after the offence had taken place makes this claimed advantage more apparent than real. In contradistinction, existing international law antedated both the criminal acts committed by enemy personnel and the municipal legislation which provided sanctions against them.² Finally, it must be observed that, even in Anglo-American jurisprudence, municipal law relating to discipline within the armed forces will offer a sound basis for the punishment of war crimes committed by members of a belligerent's own forces.

However, if attention is paid to all the ramifications of trials under national law, the consequences of its employment are not conducive to optimism concerning the future course of the law of war. In the first place, the jurisdiction of war crimes tribunals is thereby normally confined to offences committed on the soil of the prosecuting state or against its nationals and residents. Special occupation courts therefore become necessary in order to deal with those war crimes which are within the jurisdiction of the prosecuting state only *qua* military occupant.³ In the absence of these bases of jurisdiction, the state employing municipal law is powerless, by reason of self-imposed limitations, to deal with other offences committed even by the same accused, despite the fact that war criminals have often been guilty of a course of conduct which does violence to the nationals or interests of a number of states. Even the punishment of offences committed by allied forces who might be unwilling to enforce conformity with the law of war, or incapable of doing so, would be impossible in many circumstances. Secondly, on the ground of procedure, the theory of deprivation of immunity under international law followed by an establishment of the offence under municipal law creates a double problem of proof, leading to procedural complexity and perhaps even to acquittal of the guilty.⁴ Thirdly, the trial of war criminals under local law leads to a diversity of substantive law such that an act may be punished as a war crime in one country but not in

¹ Malézieux, 'Le Statut international des criminels de guerre', in *Revue générale de droit international public*, 49 (1941-5), p. 173.

² Ibid., pp. 173-4; see the Netherlands case of *In re Rauter* (1949), *War Crimes Reports*, vol. xiv (1949), p. 89, in which Dutch municipal law was held not to be retroactive in effect, on the basis that it was only declaratory of international law.

³ As authorized by Control Council Law No. 10. The jurisdiction of the French Permanent Military Tribunals was thus supplemented by that of Military Government Courts in the French Zone of Germany (*War Crimes Reports*, vol. iii (1948), p. 100).

⁴ The accused Grüner in *Re Wagner et Al.* (1946), *ibid.*, p. 23, was acquitted by a French Permanent Military Tribunal on the ground that the offence charged did not come within the Ordinance of 28 August 1944, it having been committed against an English prisoner in Germany.

another.¹ Besides these difficulties of legal administration, there are more fundamental objections to the use of municipal law. Of these, the fact that war crimes are of a basically different nature from crimes under national law is probably the most important, as has been indicated by the course of Netherlands jurisprudence in war crimes cases.² The war crimes of deportation and forced labour, for example, fit but awkwardly into the French municipal law concept of *séquestration*. Other violations of the international law of war, such as denationalization or interference with the religious rights of prisoners of war, probably have no counterparts in municipal law. Furthermore, during the Second World War war crimes were inspired by the state, were carried out on a widespread and systematic basis, and were actually seldom the private acts of individuals. Municipal law has hitherto not been called upon to deal with mass deportations and killings or with cruelty designed and executed by another state, nor can it offer much assistance to the court which is, for example, considering whether the accused committed a crime not in compelling prisoners to perform labour but in compelling them to perform a type of labour which the Geneva Prisoners of War Convention of 1929 forbids. Only to the extent that war crimes are tried under national law by transformation of the norms of international law into precepts of municipal law corresponding closely thereto are the difficulties inhering in the continental view rendered less troublesome. They still persist, however, in such forms as limitation of jurisdiction.

If, in those states in which war crimes are tried under municipal law, the function of international law is to furnish a justification for acts of warfare which are thereby recognized to be lawful, the law of war loses its reasonableness. The international law of war is 'prohibitive law' and its purpose is to place curbs upon the otherwise unrestrained violence of war. Belligerent acts in war are facts, not legal rights, and to set the law to justifying them, instead of keeping them within limits which comport with the dictates of humanity, leads to a law which places its emphasis on the rightness of war to the detriment of what is wrong in war. Any theory which relies on the law of nations as a defence for belligerent acts thus fails to accord with the true *raison d'être* of the law of war and with the many expressions of the intentions of those who have contributed to its development in recent years.

The argument concerning the relative virtues of municipal and international law in dealing with war crimes has been protracted and complex,³ and it is not proposed to attempt its resolution here. If the Anglo-American and what appears to be the view of the two International Military Tribunals is accepted, the role of international law in the suppression of war crimes is obvious. But even if war crimes are to be tried under municipal law, their international significance is not altogether lost. Although a state may try war crimes committed against its interests or its nationals or on its territory or by its nationals under its own municipal law, whether or not to punish war crimes is not left to the unfettered discretion of the state. Both the Geneva Wounded and Sick Convention of 1929⁴ and the Geneva Conventions of 1949⁵ contain positive under-

¹ Merle, *op. cit.*, p. 149; Glueck, *op. cit.*, p. 44; see Notes to *In re Becker et Al.* (France, Permanent Military Tribunal at Lyon, 1947), *War Crimes Reports*, vol. vii (1948), p. 67.

² See p. 384, *supra*.

³ There has, for example, been no agreement in France regarding the wisdom of French policy concerning the trial of war criminals (see Merle, *op. cit.*; de Vabres, 'Le Procès de Nuremberg devant les principes modernes du droit pénal international', in *Recueil des cours de l'Académie de droit international de la Haye*, 70 (1947), p. 477; Malézieux, *loc. cit.*, p. 170; de la Pradelle, 'Le Procès des grands criminels de guerre et le développement du droit international', in *Revue de droit international privé*, 14 (1947), p. 16).

⁴ Article 29.

⁵ Article 49, Wounded and Sick Convention; Article 129, Prisoners of War Convention; Article 146, Civilians Convention.

takings to enact penal legislation necessary to punish violations of those treaties, and it would appear that a like requirement is imposed by the customary law of war.¹ Military commanders, it is clear, also have an obligation to prevent the commission of war crimes by their subordinates,² just as the state may be said to have with respect to its armed forces.

Further evidence of the interest of the international community in the suppression of war crimes of the atrocity type is furnished by the numerous instances in which the prosecution of war criminals has been the subject of international consideration or agreement. Provision was made in the Treaty of Versailles and other treaties of peace following both World Wars³ for the punishment or surrender of persons who had committed 'acts in violation of the laws and customs of war' or 'war crimes'. While the Second World War was yet in progress, the punishment of war crimes was given active consideration by the United Nations.⁴ The landmarks of this war-time planning—the Declaration of St. James's, the Moscow Declaration, and the London Agreement of 8 August 1945—recognize that war crimes possess not only an importance transcending national interests but also solemn undertakings, subscribed to even by those states which prosecuted war crimes under their own law, to participate and assist in the prosecution of such crimes. More recently, the International Law Commission of the United Nations has, at the behest of the General Assembly, formulated the Nuremberg Principles⁵ and prepared a Draft Code of Offences against the Peace and Security of Mankind,⁶ among which are included violations of the laws or customs of war. By contrast, in the documents which have been mentioned and in the Charters of the International Military Tribunals, in Control Council Law No. 10, and in the multifarious directives and laws defining war crimes and providing for their punishment, there are no references to the prosecution by the tribunals so constituted of the so-called 'war crimes' of espionage, illegal hostilities in arms, war treason, guerrilla warfare, and the like. The record of more than three decades affords striking evidence of international participation in the prevention of war crimes of the atrocity type and indicates by its silence with respect to unprivileged belligerency that conduct of that nature is not, in a positive sense, of substantial international concern.

Without attempting to enumerate the many ways in which international law may be violated in such a manner as to engage the criminal responsibility of the individual, it is still possible, on the basis of the foregoing considerations, to articulate a distinction of a general nature between 'war crimes' in their proper sense and hostilities conducted by persons not of the armed forces—a subject discussed elsewhere in this volume.⁷ The tendency of international law and the particular emphasis of recent codification and

¹ See *Opinions of the Attorneys General of the United States*, 11 (1869), p. 307.

² *United States v. Yamashita* (1945), *War Crimes Reports*, vol. iv (1948), p. 1, habeas corpus denied, *In re Yamashita* (1946), 327 U.S. 1.

³ Articles 228–30, Treaty of Versailles; Articles 173–6, Treaty of St. Germain; Articles 118–20, Treaty of Neuilly-sur-Seine; Articles 157–60, Treaty of Trianon; Article 45, Treaty of Peace with Italy, 1947; Article 5, Treaty of Peace with Bulgaria, 1947; Article 6, Treaty of Peace with Hungary, 1947; Article 6, Treaty of Peace with Roumania, 1947; Article 9, Treaty of Peace with Finland, 1947.

⁴ For the history of this planning see *The United Nations War Crimes Commission and the Development of the Laws of War* (1948), pp. 87 ff.

⁵ *Report of the International Law Commission covering its Second Session*, 5 June–29 July 1950, United Nations General Assembly, 5th Session, Official Records, Supp. No. 12 (U.N.Doc. A/1316), Part iii.

⁶ *Report of the International Law Commission covering its Third Session*, 16 May–27 July 1951 (U.N.Doc. A/CN. 4/48, 30 July 1951), ch. iv.

⁷ See above, pp. 324–45.

change in the law of war has been on the protection of categories of persons, the greater number of whom are persons who cannot, as a matter of fact, engage in hostilities. These protected classes are the wounded and sick, prisoners of war, civilians in the territory of a party to the conflict, and the populations of occupied areas.¹ In addition to these, members of the armed forces who are neither disabled nor in the hands of the enemy are, to a limited extent, also granted a protected status, for international law attempts to shelter them from unnecessary suffering and the unrestrained barbarities of war. Acts against any of these persons, by whomsoever committed, which are in violation of those fundamental principles of the law of war which forbid the infliction of unnecessary suffering and the creation of conditions which make impossible the restoration of peace therefore constitute war crimes. Hostile acts, however, which would if committed by members of the armed forces not be in violation of the law of war are not war crimes, since they do not prejudice the rights secured to protected categories of persons. It is the former category in which the international community has a substantial and continuing interest, made manifest by the number of occasions on which war crimes have been tried under international law or have been the subject of international agreements. This international concern in the protection of human rights and the restoration of peace can be vindicated only by the humanitarian intervention of international law and not merely by a denial of privileged status under the law of war. The resolution of those cases, notably those of ruses, which do not clearly fall into either the category of war crimes or that of unprivileged belligerency must therefore depend upon a determination whether the act complained of is of so perfidious or inhumane a character as to require the active intervention of the law of nations.

Stated in positive form, the trial of war criminals under international law permits the direct application of a uniform law of a specialized nature to acts which are distinguished from common law crimes by reason of their occurrence in time of war. International law also surmounts the jurisdictional barrier, as municipal law cannot, by recognizing the universality of jurisdiction enjoyed by war crimes tribunals. Recent prosecutions of conventional war crimes and crimes against humanity have afforded many significant instances in which the victims of crimes have included few or no nationals of the prosecuting state. In the *Zyklon B* case,² for example, those killed by poison gas supplied by the accused included Belgian, Dutch, French, Czech, and Polish nationals, and it was not alleged that any British subjects were among the victims. The Nuremberg Subsequent Proceedings conducted by the United States pursuant to Control Council Law No. 10 involved, in the great majority of cases, offences committed against other than United States citizens, whether they had been the victims of plundering by German industrialists,³ members of occupied populations or prisoners of war for whose death or injury the German High Command was responsible,⁴ or persons deprived of the

¹ The other means available to make effective the protection of these persons are of doubtful efficacy. The sanction of public opinion and protests to the offending belligerent through the protecting power or the International Committee of the Red Cross have not been sufficient to deter states bent upon a course of systematic violation of the law of war. To a considerable extent, the power to exact compliance with the law through the instrument of reprisals has been lost, for the Geneva Conventions of 1949 contain specific prohibitions of reprisals against prisoners of war (Article 13), including the wounded and sick, and civilians (Article 33), violence against whom has, in any case, been difficult to reconcile with the humanitarian purpose of the law of war.

² *In re Tesch et Al.* (British Military Court, Hamburg, 1946), *War Crimes Reports*, vol. i (1947), p. 93.

³ *United States v. Krupp et Al.* (1948), *Trials of War Criminals*, vol. ix (1950), p. 1327, *War Crimes Reports*, vol. x (1949), p. 69.

⁴ *United States v. Von Leeb et Al.* (1948), *Trials of War Criminals*, vol. xi (1950), p. 462, *War Crimes Reports*, vol. xii (1949), p. 1.

benefit of law by the defendants in the *Justice Trial*.¹ Consequently, not only did the *locus* of the particular offence become immaterial,² but the United States also prosecuted persons who had been responsible for war crimes before that country had become involved in war.³ In addition to the many prosecutions of nationals of states at war with the United Nations, there are numerous instances of the trial of Allied nationals and even of nationals of neutral states who had taken part in such crimes.⁴ Although the prosecution of these persons was rationalized on the basis that the individuals concerned had subjected themselves to the jurisdiction of Allied war crimes tribunals by associating themselves with the enemy, they nevertheless point to a tendency to universality in the prosecution of such acts. It must be conceded that true universality has not been attained by those countries which apply international law to enemy war criminals, for the victims of conventional war crimes were, almost without exception, nationals of states allied with the prosecuting state or of the prosecuting state itself and the accused were either enemy nationals or persons who had voluntarily associated themselves with the enemy forces or administration. Crimes against humanity have, it should be observed, gone beyond these confines since even the enemy's conduct with respect to its own population has been said to be cognizable by a tribunal to which has been presented a charge of a crime against humanity.⁵

It may fairly be objected at this point that, although a distinction of a theoretical nature may exist between the problems of the qualifications of belligerents and of war crimes, as properly defined, no practical consequences flow from this dichotomy. Whether the individual is prosecuted for a war crime or is considered not to be entitled to prisoner of war status, the maximum penalty of death can, and often will, be imposed, and it matters little to the individual facing execution that there were two different possible bases for his impending death. This objection, however, overlooks a number of collateral legal problems for which the distinction is significant and disregards the importance of sound theory for the future development of the law of war.

In the first place, the state on whose behalf secret warfare is conducted and the states allied with it have neither a responsibility to restrain that form of warfare nor an obligation to punish its conduct. By contrast, there exists a duty for states not only to deal with war crimes committed by its enemies but also to punish war criminals amongst its own nationals as well, including the regular armed forces, civilians, and unprivileged belligerents fighting on its behalf.

It would also appear that the obligations of neutral states—if that expression can be said to retain any significance—differ with respect to the war criminal and the unprivileged belligerent. The duty of the neutral with respect to the latter would seem to be

¹ *United States v. Altstoetter et Al.* (1947), *Trials of War Criminals*, vol. iii (1951), p. 954, *War Crimes Reports*, vol. vi (1948), p. 1.

² *In re Sandrock et Al.* (British Military Court, Almelo, 1945), *ibid.*, vol. i (1947), p. 35; *United States v. Eisentrager et Al.* (1947), *ibid.*, vol. xiv (1949), p. 8, habeas corpus denied, *Johnson v. Eisentrager* (1950), 339 U.S. 763; *United States v. Hisakasu et Al.* (1946), *War Crimes Reports*, vol. v (1948), p. 66; *United States v. Sawada et Al.* (1946), *ibid.*, p. 1.

³ *United States v. Remmele* (1947), *ibid.*, vol. xv (1949), p. 44.

⁴ *In re Kramer et Al.* (British Military Court, Luneburg, 1945), *ibid.*, vol. ii (1947), p. 1 (Polish nationals); *In re Jøpson et Al.* (British Military Court, Luneburg, 1946), *ibid.*, vol. xv (1949), p. 46 (Danish national); *United States v. Espinosa* (1947), *ibid.*, p. 46 (Spanish national); and other cases cited *ibid.*, pp. 45-46; see Control Council Law No. 10, Article II, para. 2.

⁵ *United States v. Altstoetter et Al.* (1947), *Trials of War Criminals*, vol. iii (1951), p. 982, *War Crimes Reports*, vol. vi (1948), p. 40; *United States v. Ohlendorf et Al.* (1948), *Trials of War Criminals*, vol. iv (1949), p. 499; *United States v. Milch et Al.* (1947), *ibid.*, vol. ii (1949), p. 791, *War Crimes Reports*, vol. vii (1948), p. 40.

indicated by his combatant status and to entail the internment of the individual.¹ To turn such an individual over to the enemy thereafter would appear to be as much a violation of neutral obligations as would the rendition to the enemy of a member of the armed forces who had come into the territory of the neutral. However, there is no like obligation imposed by international law to prevent a neutral state from turning over to a belligerent for trial a person against whom a valid *prima facie* case of war criminality may be made out.² It is in accordance with the principle of universality in dealing with war crimes and with the international interest in the suppression of such offences, from which that jurisdiction is derived, that neutral states should not be in a position to thwart the prosecution of violators of international law without themselves becoming chargeable with an abuse of rights.³ To the extent that the theory which applies municipal law to war crimes emphasizes the national interest in their punishment, the extradition of war criminals becomes correspondingly more difficult to justify on grounds of policy and of logic.

What is referred to as universality of jurisdiction over war crimes⁴ falls considerably short of that goal as long as the jurisdiction is exercised by a belligerent only over persons associated with its enemies. There is reason to suppose, however, that one of the intermediate stages on the way to a true international penal jurisdiction⁵ may be the recognition that any state, including a neutral, has jurisdiction to try war crimes. By what state prosecution of a particular offence will actually be undertaken would then be determined, as it is now between allied or associated belligerents, by the convenience of the forum.⁶ If a neutral state should, by reason of the availability of the accused, witnesses, and evidence be the most convenient *locus* in which to try a war crime, there is no reason why that state should not perform that function. On the other hand, the penalizing of so-called 'unprivileged belligerency'⁷ on the part of spies, saboteurs, and the like, is an aspect of belligerency rather than an exercise of international penal jurisdiction, and there is accordingly every reason for denying jurisdiction to any state other than the offended belligerent or a state allied or associated with it.

Jurisdiction over war crimes continues until the termination of war by a treaty of peace, unless the treaty itself extends its duration.⁸ By contrast, both 'unprivileged belligerency', which partakes of the nature of a ruse, and the enemy's jurisdiction to penalize it should be said to terminate either by the return of the individual to his own army or by reason of a definite cessation of hostile activity. In all probability, the cessation of hostilities between belligerents should have a like effect on unprivileged belligerency, since the death penalty which may be imposed in such cases is juridically akin

¹ Partisans were so interned by Switzerland during the Second World War (*Report of the International Committee of the Red Cross on its Activities during the Second World War (September 1, 1939-June 30, 1947)* (1948), vol. ii, p. 304; see also the case of the two German secret agents interned in Ireland in 1944, referred to in Spaight, *Air Power and War Rights* (3rd ed., 1947), p. 317.

² See Neumann, 'Neutral States and the Extradition of War Criminals', in *American Journal of International Law*, 45 (1951), p. 495; Morgenstern, 'Asylum for War Criminals, Quislings, and Traitors', in this *Year Book*, 25 (1948), p. 382.

³ Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', in this *Year Book*, 21 (1944), p. 93.

⁴ See Brand, 'The War Crimes Trials and the Laws of War', in this *Year Book*, 26 (1949), p. 416; Cowles, *op. cit.*, pp. 177-218.

⁵ See *Historical Survey of the Question of International Criminal Jurisdiction* (1949), U.N.Doc. A/CN. 4/Rev. 1.

⁶ *In re Kramer et Al.* (British Military Court, Luneburg, 1945), *War Crimes Reports*, vol. ii (1947), p. 8.

⁷ See above, pp. 324-45.

⁸ *In re Yamashita* (1946), 327 U.S. 1, 12.

to death in battle. Jurisdiction over war crimes is thus observed to be of greater duration than that over spies, *francs-tireurs*, and guerrilla fighters.

A distinction between war crimes and unprivileged belligerency also indicates the several paths which must be taken in dealing with the punishment of these two types of acts. In the case of the former, the objective must be the creation of a mature system of criminal jurisprudence on a universal basis, possibly culminating in the establishment of permanent international tribunals. In the case of unprivileged belligerency, international law, it is submitted, should merely concern itself with assuring a fair determination of the individual's status by the belligerent in whose hands he is and, where appropriate, with the establishment of maximum punishments. The increasing meaninglessness of the uniform as determinative of rights may ultimately lead to a recognition of all belligerents, or of all armed belligerents, as 'lawful'.

The law of war to which reference has been made in this Note is, of course, the conventional law of war governing the hostilities of enemy states. It may be anticipated that in the future the law of war may become a body of law relating to hostilities conducted between forces under the aegis of the international community and those of a state which has violated international law in resorting to war.¹ While changes in the law of war may be expected to accompany this transformation, there is no basis for concluding that all the belligerents of the offending states will be regarded as criminal in an international sense or that the armed forces of an international police force will be subject to no legal restraints.²

R. R. B.

¹ Jessup, *A Modern Law of Nations* (1950), pp. 188 ff.

² See Oppenheim, *International Law*, vol. ii (7th ed. by Lauterpacht, 1952), § 61.

DECISIONS OF ENGLISH COURTS DURING 1950-1951 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW

State Immunity—Submission to Jurisdiction—Requirement of Express Submission—Position of Members of British Commonwealth of Nations

Case No. 1. *Kahan v. Federation of Pakistan*, [1951] 2 K.B. 1003. On 4 January 1951 the plaintiff named in a writ a number of defendants, including the Government of Pakistan. The relief claimed was for breach of a contract to sell Sherman tanks to the Government of Pakistan. The latter entered conditional appearance and issued a summons to set aside the writ. The Master made an order providing for the alteration of the description of the first defendant from 'Government of Pakistan' to 'Federation of Pakistan' and set the writ aside, in so far as it purported to implead the Federation of Pakistan. He also ordered the defendant's costs to be paid by the plaintiff. The plaintiff appealed to Mr. Justice Slade in Chambers. Basing himself on a letter from the Secretary of State for Commonwealth Relations, Mr. Justice Slade dismissed the appeal. The letter read as follows:

'With reference to your letter of March 9, stating that for the purpose of an interlocutory application in the above action Mr. Justice Slade desires to have a certificate indicating whether Pakistan is an independent sovereign state, I am instructed by the Secretary for Commonwealth Relations to inform you that an independent Dominion of Pakistan was set up by section 1 of the Indian Independence Act, 1947. Under the subsequent provisions of that Act, and particularly sections 5, 6 and 7, and by reason of the constitutional conventions, Pakistan is a self-governing country within the British Commonwealth of Nations, sovereign both in external and internal affairs, linked with the United Kingdom, through a common allegiance to the Crown but in other respects independent of it. In the view of the Secretary of State, therefore, Pakistan is an independent sovereign state.'

The plaintiff appealed to the Court of Appeal. It was *held* by the Court of Appeal that, on the hypothesis (which the appellant did not contest) that the status of the Federation of Pakistan was equivalent to that of a foreign sovereign state, there was no occasion to exempt this case from the general rules laid down in the well-known cases of *Mighell v. Sultan of Johore*,¹ *Duff Development Company, Limited v. Kelantan Government*,² and *The Cristina*,³ and that these rules must apply. The appellant relied upon clause 19 of the contract, which stated, *inter alia*: 'The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English Courts.' Jenkins L.J., however, stated: 'I think it is established beyond question by authorities binding on this Court that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the Court—will suffice.'

A feature of this case is that the plaintiff did not contend that the Federation of Pakistan, on account of its being a member of the British Commonwealth, was not in the same position as a foreign sovereign state, as regards jurisdictional immunities, but in a less favoured position. This point had been raised before the Master, where it was said that the action might be regarded as an action against the Crown in its capacity as Sovereign of Pakistan. The defendants, however, had argued that the action did not lie on the ground that the Crown Proceedings Act, 1947, which enables the Crown to be sued by writ, would not

¹ [1894] 1 Q.B. 149.

² [1924] A.C. 797; this *Year Book*, 7 (1926), p. 218.

³ [1938] A.C. 485; this *Year Book*, 19 (1938), p. 243.

apply to the Crown in its capacity as Sovereign of Pakistan. Before the Court of Appeal the appellant mentioned this point again, but did not press it. In fact it was counsel for the respondents who intervened and, while wishing to keep the matter open, suggested that special considerations might apply to the case of a member of the British Commonwealth of Nations, whose rights stemmed from an Act of the Imperial Parliament—considerations which would not apply in the ordinary case of a sovereign state in the strict sense of the expression. Presumably counsel had in mind considerations which would put a Commonwealth Government in an even more favoured position than a foreign Government, but he did not elaborate what these considerations are.

Ultimately, both parties agreed that for the purposes of the appeal the Federation of Pakistan was in the same position as a foreign sovereign state so far as the question of immunity was concerned. On this basis, having regard to established authorities, the result was a foregone conclusion. Perhaps the only reason for proceeding with the appeal was the unfounded hope that, with the tide running against extreme notions of state immunity, the Court of Appeal might give judicial effect to some of the sentiments which had been expressed, *obiter*, in *Dollfus Mieg et Compagnie S.A. v. Bank of England*.¹ As stated, however, in the preceding volume of this *Year Book*, 'Anglo-American case-law on this subject has become so rigid that a change would probably require legislation'.²

Annexation—Recognition of—Annexation of Estonia by Soviet Russia—Requisitioning of Foreign Vessels

Case No. 2. *The 'Olev' and Other Estonian Vessels*, [1951] 84 Ll.L. Rep. 513. These proceedings before the Shipping Claims Tribunal concerned claims brought by various Estonian shipowners against the Ministry of Transport for compensation, under the Compensation (Defence) Act, 1939, in respect of the *Olev* and eleven other Estonian vessels. Each vessel was owned by a 'shipping association' constituted under Estonian law before the invasion of Estonia by Soviet forces in 1940. Estonia was subsequently occupied by the Germans in 1941 and by Soviet forces again in 1944. With one exception the vessels were requisitioned by the British authorities in October and November 1940. The exception was the *Alar*, which, having been used first by the Russians and then by the Germans, was brought to England by Allied forces at the end of the war, was requisitioned there in December 1947, and was still afloat.

In the case of the *Olev* and five other vessels—which were all still afloat—the claimants alleged that they were still the owners of the vessels by Estonian law. Four vessels had been lost—it was agreed to treat the *Romeo*, which had been sold for scrap, as lost—and claims were also made on behalf of various Estonian owners in respect of these vessels. Another vessel, the *Elna*, had been handed over by the British authorities to the U.S.S.R., and it was agreed that her owners should be placed in the same position as if she had been lost. There remained the *Alar*, which has been referred to above.

The Compensation (Defence) Act, 1939, provided for compensation in respect of requisitioning under two heads:

- (a) A sum equal to the amount which might reasonably be expected to be payable by a person for the use of the vessel during the period of the requisition, under a charter whereby he undertook to bear the cost of insuring, maintaining, and running the vessel (Section 4 (1) (a)); and
- (b) If a total loss occurred, a sum equal to the value of the vessel immediately before the occurrence of the damage which caused the loss (Section 4 (1) (d)).

The Act also provided (Section 11) that no claim for compensation under the Act should be entertained unless notice was given to the prescribed authority within six months (or such longer period as allowed by the Treasury) either of the date on which the compensation accrued due or of the date of the passing of the Act, whichever was the

¹ [1950] 1 All E.R. 747; this *Year Book*, 27 (1950), p. 460.

² Loc. cit., p. 461. See, however, Professor Lauterpacht's article, pp. 220-72 above.

later. In the case of seven vessels, therefore, there was a claim under head (a) only, and in the case of five vessels a claim under both head (a) and head (b).

Notice of the proceedings was given by the Foreign Office to the Soviet Embassy in London. The Embassy replied that it was unable to recognize either the action of the British Government in requisitioning the vessels or the jurisdiction of the Tribunal, and claimed that the vessels were the property of the U.S.S.R. However, the Ministry of Transport made no admission as to the validity of the claim and the Soviet Government did not intervene in the proceedings.

It was *held* that judgment should be given for the claimants in each case. Even though it had not been suggested by the Ministry of Transport that any of the claims were time-barred, the Tribunal was bound by its decision in *Glen Line Ltd. v Minister of Transport*¹ to examine this question spontaneously. It found that, with regard to the vessels still under requisition, the claim, whenever made, was sufficient to found the jurisdiction of the Tribunal. With regard to the other vessels, it was held on the basis of the decision in the case of the *Jaak and Other Estonian Vessels*² that notices lodged by the Estonian Minister³ on behalf of the owners, who owing to the circumstances were unable to put forward their claims within the prescribed time limit, were valid notices and sufficient to satisfy Section 11 of the Act. It was further held, contrary to the decision in the *Jaak* case, that the notices given by the Estonian Minister, which claimed compensation under Section 4 (1) (a) of the Act only, were also sufficient to found jurisdiction to entertain claims under Section 4 (1) (d) in addition. On the merits of the case, it was held that, although there was evidence that, during the Soviet occupation of Estonia in 1940-1, a number of general nationalization decrees, extending even to shipping, were issued, there was no precise evidence that any part of the old Estonian law relating to shipping associations had been repealed. In the case of at least eight of the vessels, the Tribunal found that the ship had in each case been owned by a shipping association, of which the disponent and principal shareholder was the A/S Tallinna Laevauhisus (Tallinn Steamship Company). This company had not been dissolved according to Estonian law;⁴ its principal place of business was now Stockholm; and it had never been an alien enemy.

In the case of these eight vessels, the Tribunal found that the respective shipping associations, through the Tallinn Steamship Company, were still the persons entitled to receive compensation. It was alleged that three of these ships had been transferred to Swedish ownership, but the Tribunal found that any such transfer was invalid both by Estonian and by Swedish law, and so had not taken place. The same applied to the ninth vessel, of which the Tallinn Steamship Company was the sole owner. There remained the cases of the *Romeo*, the *Elna*, and the *Alar*. The *Romeo* (which had been sold for scrap) was alleged to have been flying the Soviet flag immediately before being requisitioned. This fact, however, even if true, could not, in the absence of any precise Soviet requisitioning decree, deprive the claimant shipping association of its rights—the more so as the vessel had not been in Estonian territorial waters or otherwise within the arm of Soviet law since 1939. As for the *Elna* (which, after being requisitioned by the British, had been handed over to the U.S.S.R.), the fact that the shipping association which owned her had

¹ 82 Ll.L. Rep. 404.

² 83 Ll.L. Rep. 45.

³ For the Foreign Office certificate concerning the attitude of the British Government towards the changes of government in Estonia during the war see the case of *A/S Tallinna Laevauhisus and others v. Tallinn Shipping Company Ltd., and Estonian State Steamship Line*, 79 Ll.L. Rep. 245 or this *Year Book*, 23 (1946), p. 384. The Estonian Minister, referred to above, continues to exercise in the United Kingdom certain functions, mainly of a consular character, on behalf of Estonian nationals resident in the United Kingdom.

⁴ See the judgment of Atkinson J. in the case of *A/S Tallinna Laevauhisus and others v. Tallinn Shipping Company Ltd., and Estonian State Steamship Line*, 79 Ll.L. Rep. 245 or this *Year Book*, 23 (1946), p. 384—confirmed on appeal at 80 Ll.L. Rep. 99 or this *Year Book*, 24 (1947), p. 416—to the effect that the plaintiff company, which was also the principal disponent in the *Olev* case (now under discussion), had not been dissolved.

been dissolved upon the handing over of the vessel to the U.S.S.R., did not deprive the disponents, as liquidators of the dissolved association, of their right to claim compensation. Finally, as for the *Alar* (which had been used first by the Russians, then by the Germans, and then by the British), it was held that, although the Soviet authorities had taken over the vessel at one time, there was evidence that, during the subsequent German occupation of Estonia, the shipping association which owned her had resumed ownership and that, as the German authorities had never taken any steps to transfer the legal ownership of the vessel, such as by condemning her in Prize, the shipping association (which still existed) was entitled to bring the claim through the disponent.

Extraterritorial Effect of Foreign Decrees—Public Policy—Decrees of Governments-in-Exile

Case No. 3. *Bank Voor Handel en Scheepvaart v. Slatford and Another*, [1951] 2 All E.R. 779. In this case the plaintiffs were a bank incorporated in 1918 in the Netherlands. The defendants were the Custodian of Enemy Property and the Administrator of Hungarian Property. In 1936 all shares in the bank came into the possession of a Hungarian national with a Swiss domicil. After his death in 1947, 62½ per cent. of the shares were owned by a Hungarian national. Before the war the bank deposited some gold with the City Safe Deposit in London. In May 1940 the Netherlands were occupied by German forces with the result that they became 'enemy territory' and that the bank acquired 'enemy character' for the purposes of the United Kingdom 'Trading with the Enemy' legislation. On 24 May 1940 the Royal Netherlands Government in London issued a decree entrusting to the Netherlands State, for as long as might be necessary, the property of persons resident in the Netherlands (including the property of the plaintiff bank). On 3 July 1940, however, the Board of Trade, under Section 7 of the Trading with the Enemy Act, 1939, made an order transferring the gold to the Custodian of Enemy Property and on 22 July made a further order authorizing the Custodian to sell the gold. On 24 July the gold was sold and the sum realized, together with the balances due to the plaintiffs from certain banks in London, was retained by the Custodian. In July 1948 the control of the Netherlands Government over the plaintiff bank was removed, and in May 1950 the Netherlands Government made an order making restitution of the property taken from it under the decree of 24 May 1940.

As against the first defendant, the Custodian, the plaintiffs claimed (i) a declaration that the Custodian was a trustee for the Netherlands State and for the plaintiffs of the gold and of the bank balances, and (ii) damages for conversion of the gold. They argued that the orders made in July 1940 were invalid since, at that date, the property in the Custodian's hands was not enemy property, by virtue of the Trading with the Enemy Act, but was the property of the Royal Netherlands Government by virtue of the decree of 24 May 1940. The issue, therefore, was the effectiveness in this country of the Netherlands decree. (The Royal Netherlands Government, being established in London, did not have 'enemy character' for the purposes of the 'Trading with the Enemy' legislation.) As against the second defendant, the Administrator, to whom the Custodian transferred in 1950 the greater part of the proceeds of the sale of the gold and the bank balances, the plaintiffs claimed a declaration that they were entitled to this money on grounds based on the interpretation of the Treaty of Peace legislation, and they also claimed recovery of the money with interest. Article 1 (2) of the Treaty of Peace (Hungary) Order, 1948, provided that all 'property, rights or interests' to which the Order applied were to be charged with the amounts due at the date when the peace treaty came into force in respect of claims against the Hungarian Government or Hungarian nationals. Article 1 (3) of the Order defined the property so charged as 'any property, rights or interests within His Majesty's Dominions . . . belonging to or held or managed on behalf of the Government of Hungary or a Hungarian national'. Article 1 (5) of the Order provided that, if it were subsequently proved that the 'property, rights or interests' were not in fact subject to the charge, the owner should be entitled to recover them or their proceeds from the Administrator. It was *held*, by Mr. Justice Devlin:

(i) *As against the Custodian*, that the plaintiffs must fail.

The plaintiffs put their case in two ways:

- (a) English courts must apply the legislation of a foreign state affecting the title of its nationals to movables in England, unless (1) the legislation is contrary to public policy (e.g. confiscatory or penal legislation), or (2) its application would infringe English legislation.
- (b) Even if the general rule was that foreign legislation of this type was not enforceable in England, this particular decree constituted an exception.

For both these arguments, the plaintiffs relied heavily on *Lorentzen v. Lydden*¹ in which Mr. Justice Atkinson held that a decree of the Royal Norwegian Government acquiring, in return for compensation, property of its subjects in England, was effective to transfer such property to the Norwegian Government, one of the reasons for this decision apparently being that, England and Norway being engaged together in a desperate war for their existence, public policy required that effect should be given to the decree. The plaintiffs also relied on *O/Y Wasa Steamship Company, Limited v. Newspaper Pulp and Wood Export, Limited*,² where Mr. Justice Morris applied the decision in *Lorentzen v. Lydden* to the Netherlands decree of 24 May 1940. The defendants relied mainly on the case of the *El Condado*,³ where the Inner House of the Court of Session refused to enforce a requisitioning decree of the Spanish Republican Government against a Spanish ship outside Spanish territorial waters. Devlin J., therefore, was confronted with a problem which had long since engaged the attention of writers, namely the apparent incompatibility of the *El Condado* decision with the decision in *Lorentzen v. Lydden*, and also with the decision of the New York Courts in *Anderson v. N. V. Transandine*,⁴ another case concerning the Netherlands decree of 24 May 1940 and also a case followed by Mr. Justice Atkinson himself in *Lorentzen v. Lydden*.

With the battle thus joined, it was natural that the earlier cases concerning the extra-territorial effect of confiscatory and requisitioning decrees such as *Lecouturier v. Rey*,⁵ *The Jupiter*,⁶ and the *Russian Bank* cases should be referred to. The learned judge attributed great weight to the declaration by Lord Mackay in *The El Condado* (at p. 338) that he found in the earlier cases 'a most emphatic train of eminent English judges in favour of the view that such "decrees" of a foreign country as purport to have extra-territorial effect, and to attack property in a subject situated, and at a time when it is situated, in this country or its territorial waters, will not be recognized by our laws and courts'. The emphasis in some of the cases and the text-books on the rule that our courts will not give extraterritorial effect to the *confiscatory* legislation of other States had, according to the learned judge, obscured the general rule that it is the *lex situs* which governs the transfer of movables. This was sufficient to dispose of the plaintiffs' first contention, although it must be admitted that, on this basis, it is not clear why it was ever necessary to draw a distinction between confiscatory and non-confiscatory decrees.⁷

As regards the second argument, that the Netherlands decree of 24 May 1940 should form an exception to the general rule, the learned judge rejected that argument on the grounds that 'it would be unwise . . . to propound as a new rule of public policy the principle for which the plaintiffs contend'. As for the statement by Mr. Justice Shientag in

¹ [1942] 2 K.B. 202; this *Year Book*, 21 (1944), pp. 185, 231.

² (1949), 82 Ll.L. Rep. 936.

³ (1939), 63 Ll.L. Rep. 330. See also *Annual Digest and Reports of Public International Law Cases*, 1938-40, Case No. 77.

⁴ (1941), 28 N.Y. Supp. (2nd) 547, and (1942), 289 N.Y. Rep. 9. See also *Annual Digest and Reports of Public International Law Cases*, 1941-2, Case No. 4.

⁵ [1910] A.C. 262.

⁶ (1927), P. 122; (1927), P. 250; this *Year Book*, 7 (1926), pp. 219-20.

⁷ In any case the distinction between the two types of decree is necessarily a difficult one to draw, especially in cases where a measure of compensation, though inadequate, is provided. The distinction is, however, one that frequently occurs. See the case of *Frankfurter v. W. L. Exner Ltd.*, referred to below, p. 400, n. 2.

Anderson v. N. V. Transandine that since 'the public policy of the decree is in harmony with the public policy of the forum, the decree should be upheld by our Courts under the principles of comity', Mr. Justice Devlin, relying on the recent cautious observations of the Court of Appeal on the subject of public policy in *Monkland v. Jack Barclay, Limited*,¹ commented that *Anderson v. N. V. Transandine* appeared 'to be a dangerous precedent to follow' and that 'public policy appears to be in the New York Courts a more flexible instrument than in this country'.

(ii) *As against the Administrator*, the plaintiffs were successful. As the 'property' of the bank, within the meaning of the Treaty of Peace (Hungary) Order belonged to the bank *qua* company, and not to its shareholders, the gold and the bank balances were not 'property, rights or interests . . . belonging to or held or managed on behalf of . . . a Hungarian national' (*vide* Article 1 (3) of the Order), even though the majority shareholder of the bank was a Hungarian national. Accordingly, the gold and the bank balances were not subject to the charge imposed by Article 1 (2) of the Order, and under Article 1 (5) (g) of the Order the plaintiffs were entitled to recover them from the Administrator. The Court thus distinguished the bank from its shareholders and attributed to the bank the nationality of the country in which it was incorporated and not the nationality of the majority of its shareholders. Further, as the Court's power to award interest was not a separate and additional remedy but a relief ancillary to the right under Article 1 (5) (g), the Court had a discretion to award interest, which it decided to exercise by awarding interest at 4 per cent. per annum as from the date on which the bank balances and the proceeds of the sale of the gold reached the Administrator.

Extraterritorial Effect of Decrees—Confiscatory Decrees—Trading with the Enemy—Licences to Trade.

Case No. 4. *Novello & Co. Ltd. v. Hinrichsen Edition, Ltd. and Another*, [1951] 1 All E.R. 779. The facts in this case are rather complex, but the case repays study for it concerns a number of separate problems of international law. Briefly, the facts were as follows: Henri Hinrichsen, a Jew residing in Leipzig, owned a music publishing firm there, called C. F. Peters. In 1933 he took his eldest son, Max, into partnership, but in 1937 Max emigrated to England, whereupon Henri Hinrichsen took another son, Hans, into partnership in place of Max. By an agreement of 1937 the firm of C. F. Peters appointed Novello & Co. Ltd., an English music publishing company, their agents in the United Kingdom for the sale of the firm's publications, but the agreement contained no assignment of the English copyright in any of the works published by the firm. Under a decree of 3 December 1938 the two Hinrichsens, being Jews, were forbidden by the German Government to carry on the business, which was sold to two other Germans by a trustee acting on behalf of the German Government. The validity of this contract of sale was dependent on the consent of two German Ministries, and the final consent was given on 25 September 1939—i.e. after the outbreak of war. The two Hinrichsens were not parties to the contract, but they were compelled under duress to sign a document in July 1939, wherein they assented to the sale. In 1942 Henri Hinrichsen died, being already predeceased by Hans and by the executor named in his will. In 1949 Max was granted, out of the Principal Probate Registry in England, letters of administration, with the will annexed, of his father's estate.

Meanwhile in 1940, and again in 1948, Novello & Co. Ltd. had obtained from the Comptroller-General of Patents, Designs and Trade Marks, by virtue of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, licences in respect of the copyright of certain works published by C. F. Peters. The purpose of this Act was to ensure that patents, copyrights, &c., could be used in the public interest, even though the person who normally had the sole right to use them was prevented from using them by the Trading with the Enemy legislation. For this purpose the Comptroller-General was authorized by Section 2 of the Act to grant licences to suitable persons in such cases

¹ [1951] 1 All E.R. 714; [1951] 2 K.B. 252.

either for the residue of the term of the patent or copyright or for such less period as he thought fit. Novello & Co. Ltd. brought an action against the defendants, Hinrichsen Edition Ltd., and Max Hinrichsen, alleging infringement of copyright in respect of these works. The defendants admitted the acts complained of, but denied infringement. They argued that the forced sale in Germany, being made under a decree which was penal and confiscatory, could not affect rights existing outside Germany and that, therefore, the English copyrights were vested in Max, as administrator of his late father's will. It was also said that the defendant company had done the acts complained of on the authority of Max.

It was *held*, by Wynn Parry J., that the sale agreement of 1939 was ineffective to pass any interest in any English copyright owned by Henri Hinrichsen and Hans Hinrichsen, and, therefore, that the action must be dismissed. The learned judge applied the rule in *Frankfurter v. W. L. Exner Ltd.*,¹ which, he said, established that 'the courts of this country will not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which is confiscatory in policy,² and also that 'this doctrine extends to an act such as the appointment of a so-called trustee pursuant to such a decree, the effect of which is to take out of the control of the owner the management of his business'. In the opinion of Wynn Parry J. it was not an extension of this doctrine to apply it to a sale by a trustee so appointed, such as the purported sale in this case, and, even if it were an extension of the doctrine, it was one that was consistent with principle. Looking at the substance of the matter rather than at the form, the learned judge found nothing in the sale agreement to take the case out of the rule in *Frankfurter v. W. L. Exner Ltd.*, *supra*. Further, the sale agreement did not become valid until 25 September 1939, and, even though under German law the Ministries' consent gave the agreement retroactive effect, the agreement was only effective to pass any property on that date. This date being after the outbreak of war, the agreement was one by which a chose in action was assigned by an enemy after the passing of the Trading with the Enemy Act, 1939, on 5 September 1939, and was therefore, by virtue of Section 4 (1) of that Act, ineffective to transfer under the agreement any English copyrights owned by Henri Hinrichsen and Hans Hinrichsen.

There remained the question of the licences obtained by the plaintiffs. The Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, provided that the comptroller could grant a licence where it was in the public interest that a copyright owned by an enemy subject should be exercised and there was a qualified person ready and able to exercise it. On this basis, the licence granted in 1948 was *ultra vires* the comptroller because, at the date of the application, the property in the English copyrights owned by Henri Hinrichsen (who had died leaving no executor) was, pending the grant of letters of administration to Max, vested in the English Court. Accordingly, the Act's requirement that the copyrights should be owned by an enemy subject, at the time that the application was made, was not met. It was not sufficient to show that the owner of the copyright had at any time since 3 September 1939 been an enemy subject. As regards the licence granted in 1940, it was open to the defendants to apply to the comptroller for its revocation, but, even while that licence remained valid, its effect, having regard to its terms, was merely to give the licensee a non-exclusive right and not to deprive the defendants of the right to exercise their own copyright.

The chief importance of this case rests in the reaffirmation of the principle, laid down, after a long review of the authorities, by Romer J. in *Frankfurter v. W. L. Exner Ltd.*, *supra*,³ that the English courts will not give extraterritorial effect to confiscatory decrees, and in the refusal of Wynn Parry J. to accept the contention that this principle does not

¹ [1947] Ch. 629.

² In *Frankfurter v. W. L. Exner Ltd.*, *supra*, Romer J., after a review of the authorities, expressly found that the Austrian decree in question was 'confiscatory legislation', thus indicating that the distinction between confiscatory and non-confiscatory decrees is of some importance.

³ See, however, the decision of Mr. Justice Devlin in *Bank Voor Handel en Scheepvaart v. Slatford and Another*, [1951] 2 All E.R. 779, reviewed above, at pp. 397-9.

apply when the act said to amount to confiscation is the result of a purported agreement and is not the direct result of legislation.

The plaintiffs appealed ([1951] 2 All E.R. 457), but confined their appeal to the construction of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. The grounds of appeal were:

- (a) that Max Hinrichsen, as owner of the copyrights, could not grant a licence to Hinrichsen Edition Ltd., because—it was said—the Act of 1939 took away the right of owners of copyrights to which the Act applied to exercise that right;
- (b) that the Comptroller-General had power to grant the licence in 1948, because the copyright had *at some time* since 3 September 1939 been vested in an enemy subject.

It was *held* by the Court of Appeal that Max Hinrichsen was entitled to grant the licence because, in the words of Jenkins L.J.:

‘Upon the true construction of the Emergency Act its effect is that, subject to the restrictions imposed by the Trading with the Enemy Act, 1939, owners of copyrights to which the Emergency Act applies, are still free to exercise their rights unless and until some licence affecting them is granted by the Comptroller. Such a licence, when granted, ousts any exercise of the owner’s rights which would be inconsistent with the terms of that licence. When a licence has been granted, its terms must be looked at to see how far the owner’s rights are restricted. Where, as in the present case, a mere non-exclusive licence has been granted, then there is nothing in the Act to prevent the owner, if not disqualified by some provision of the Trading with the Enemy Act, 1939, from himself exercising the copyright or granting non-exclusive licences in respect of it.’

For this reason it was not necessary to decide whether the comptroller had power to grant the licence in 1948 or not, but the Master of the Rolls was careful to express the opinion that the view of Wynn Parry J., that the comptroller had no power to grant this licence, was not necessarily well founded. In *Re I. G. Farbenindustrie Akt’s Agreement*¹ it had been decided by Morton J. that the powers of the comptroller under Section 2 (1) of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, could not be affected, one way or the other, by a decision of the Court either to make or not to make an order vesting in a British subject the patent of which an enemy company was a bare trustee.

Alien Enemy—Trading with the Enemy—Licences to Trade.

Case No. 5. *Bugsier Reederei- und Bergungs A.G. v. Owners of s.s. Brighton*, [1951] 2 T.L.R. 409. The plaintiffs, a Hamburg salvage corporation, claimed from the owners of the s.s. *Brighton* remuneration in respect of salvage services rendered in the River Weser, in Germany, on 8 and 9 January 1949. In English law an alien enemy, without special licence, has no right of access as a plaintiff to an English court during a war.² On 1 April 1944 a Royal Warrant was issued authorizing the principal Secretaries of State to issue licences ‘to persons who are in contemplation of law alien enemies to prosecute proceedings’ in the courts. On 27 June 1949 the Home Secretary signed a licence which, it was argued, constituted a royal licence authorizing the plaintiffs to sue. The defendants objected to the jurisdiction of the Court (the Probate, Divorce, and Admiralty Division) on the ground that the royal licence on which the plaintiffs relied was not a valid licence enabling them to sue.

It was *held* by Willmer J. that the defendants’ objection was ill founded. Admittedly the licence relied upon by the plaintiffs was a special one issued by the Home Secretary on 27 June 1949 in pursuance of the powers conferred by His Majesty on the Principal Secretaries of State by virtue of a warrant dated 1 April 1944 and not the general licence

¹ [1940] 4 All E.R. 486; [1941] Ch: 147; this *Year Book*, 21 (1944), p. 233.

² McNair, *Legal Effects of War* (1944), p. 40.

issued in favour of alien enemies by virtue of an Order in Council of 1949.¹ The issue of a royal licence (such as that relied upon by the plaintiffs), whether it be a licence to trade, as in *Usparichav v. Noble*,² or a licence to sue, is an executive act, the validity of which the courts cannot question. Further, even if he were wrong on this point, the learned judge found that the licence was, in fact, a validly issued licence. The defendants had objected that the warrant of 1944 was intended to benefit not Germans but only persons of Allied nationality who found themselves technically alien enemies (i.e. nationals of states which had been occupied by the enemy). The learned judge, however, could see no ground for this distinction and said that even if some distinction of this sort existed, it was one which he was bound to assume to have been considered by the Home Secretary before the licence was issued.

The learned judge also dismissed another objection based on the ground that, ever since 1945, the plaintiffs ceased to be the owners of their tugs and salvage equipment, these being chattels which had passed to His Majesty by right of conquest. Germany since the war had been occupied but not annexed. There was no authority for saying that privately owned chattels in Germany pass by reason of the occupation into the ownership of the Crown, or that the Crown enjoys any rights over property there, beyond the normal rights of requisition.

Trading with the Enemy—Power of Attorney—Whether Terminated as the Result of Outbreak of War

Case No. 6. *Hangkam Kwintong Woo v. Liu Lan Fong*, [1951] 2 All E.R. 567. In this case the appellant, a resident of Hong Kong, owned a house in Hong Kong which was subject to two mortgages for sums amounting to 73,000 and 30,000 Hong Kong dollars respectively. Before leaving Hong Kong for Free China in the autumn of 1942, i.e. during the period of Japanese military occupation, the appellant gave to one Chan a general power of attorney, specifically authorizing him to sell the appellant's property. In August 1943 Chan entered into an agreement to sell the appellant's house, free of mortgages, for 68,000 military yen. (The military yen was then the only permissible currency in Hong Kong, the prescribed rate of conversion being four Hong Kong dollars to one military yen). The purchaser paid the purchase price and Chan executed an assignment in his favour, but the sale was not completed by registration. The mortgages were, however, paid off. In September 1945 the Japanese occupation ended, and in February 1946 the appellant returned to Hong Kong.

In May 1946 the purchaser died. Two years later, in 1948, his executrix (the respondent in this case) commenced proceedings against the appellant for specific performance of the agreement of sale. In 1948 there was also passed by the Hong Kong legislature the Debtor and Creditor (Occupation Period) Ordinance, 1948 (Hong Kong Ordinance No. 24 of 1948), the effect of which was that, while it imposed on the purchaser no obligation to pay to the appellant any sum beyond the military yen already paid, it rendered the appellant liable to pay to the mortgagees a large sum in Hong Kong dollars beyond the military yen already paid in purported full discharge of the mortgage debts. In February

¹ Although no particular Order in Council is referred to in the report, it is presumed that the learned judge had in mind the Trading with the Enemy (Authorization) (Germany) Order, 1949 (S.I. 1949, No. 605, vol. i, p. 4090). This Order, issued by the Board of Trade in exercise of powers conferred by the Trading with the Enemy Act, 1939, constitutes a general licence to trade with German authorities, public and private, individuals resident in Germany, and businesses carried on in Germany. It does not of itself authorize German nationals to sue in respect of any cause of action arising out of transactions authorized by the licence. However, Order in Council No. 1534 of 1945 (S. R. and O., 1945, vol. ii, p. 100) provides that any alien enemy may, without the need for a special licence, institute and maintain legal proceedings arising out of transactions that shall have been authorized under the provisions of the Trading with the Enemy Act.

² (1811), 13 East 332. In this case Lord Ellenborough said that 'whatever commerce of this sort (i.e. trading with the enemy) the Crown has thought fit to permit . . . must be regarded by all the subjects of the realm, and by the Courts of Law, when any question relative to it comes before them, as legal, with all the consequences of its being legal'.

1949 the Supreme Court of Hong Kong (original jurisdiction) decreed specific performance of the agreement of sale, and this decision was upheld by the Supreme Court of Hong Kong (appellate jurisdiction) in June 1949. The mortgagees were not parties to the proceedings.

It was *held* by the Judicial Committee of the Privy Council that the appeal must be dismissed. The appeal was based on three grounds: The principal ground was the general argument that, since the appellant was in that part of China which was allied with His Majesty, and Chan was in enemy-occupied territory, they were divided by the line of war, and therefore that the power of attorney was abrogated. The Privy Council held, however, that 'it is the law of Hong Kong which is to be administered', that the courts of Hong Kong could not regard either the appellant or Chan as an 'enemy', and that consequently there was no 'trading with the enemy' such as the common law forbids. As the judgment says, 'whatever consequences may follow *outside the occupied territory* if one of its inhabitants, who has left it, seeks to maintain or to initiate relations with another who has stayed within it, yet *the courts of that country* cannot regard either him who has left or him who has stayed behind as enemies of the King or enemies of each other . . . there is a wide divergence between the problems which face the courts of a belligerent power and of an occupied territory'. The Board further commented that, when British territory is occupied, it is in the public interest that able-bodied men should escape to continue the fight from elsewhere. It would be positively contrary to public policy if it were to be held that such persons commit an illegality, and even a crime, when, before they escape, they leave their affairs in the hands of a responsible agent. The Privy Council did not therefore find it necessary to decide whether, as a rule, a general power of attorney is an instrument which is or is not abrogated when donor and donee are divided by the line of war. The respondent relied on *Tingley v. Müller*,¹ where it was held that an irrevocable power of attorney is not avoided by the *donor* of the power subsequently becoming an alien enemy. Their Lordships, however, clearly indicated that in their view this case—in which Scrutton L.J. had delivered a powerful dissenting judgment—was not of decisive weight.

The appellant's second plea was one of frustration. It was argued that it was never contemplated by the appellant that he would have to lose his property and, in addition, remain liable to pay substantial sums to the mortgagees. Certainly this was not contemplated by him, but their Lordships held that this change of fortune was not such that it struck at the root of the agreement and rendered its performance impossible. The purchaser had fulfilled his part of the agreement, and the appellant vendor could fulfil his part of executing a single document.

Thirdly, the appellant pleaded that the respondent should not be granted equitable relief because of hardship to the appellant. The Privy Council held that only in exceptional cases could they interfere with the exercise of a discretionary jurisdiction by the chief justice of Hong Kong in which the Full Court had concurred, and that it would be improper so to interfere here for the reason that the legislature of Hong Kong had decided that, in some cases there should, and in other cases there should not, be a revaluation of debts incurred or discharged in military yen.

From the international point of view the interest of this case lies in the refusal of the Privy Council to apply the doctrine of the 'line of war' too rigidly. The Board pointed out that, since the soil of England had not been occupied by an enemy within the period of the development of the common law, there was no clear common law rule to meet the case. Although the problem had arisen on the Continent, the Board found that no such universal rule had been evolved that it 'ought to be adopted as part of the municipal law of England or Hong Kong'. The basis of the common law rule was that the person with whom intercourse is illegal must be regarded as an enemy by the court which had to determine the illegality. Thus, if the appellant had gone to Japan instead of to Free China, there would have been trading with the enemy. Similarly, if the contract between the appellant in

¹ [1917] 2 Ch. 144.

Free China and Chan in Hong Kong had fallen to be determined in the first instance by any British court other than the Hong Kong court, there would have been trading with the enemy. However, as the appellant went to Free China and Chan stayed in Hong Kong, it was not open to the Hong Kong Court to find that there had taken place trading with the enemy. It would appear that the basis of this distinction, which had already been made by the Hong Kong courts in *Li Tsz v. Lo Kar Yam*,¹ is sound, even though it may lead to some injustice (as in this case) or to some confusion, if litigation between the same persons were to take place in the courts of several parts of the Commonwealth, some of which might happen to have been occupied by the enemy and others not. The only other conclusion to be drawn from this case is that the majority decision of the Court of Appeal in *Tingley v. Müller*, which had already been criticized by the House of Lords in *V/O Sovfracht v. N. V. Gebr. Van Udens Scheepvaart en Agentur Maatschappij*,² must now be regarded as overruled. From this it follows that the rule that 'no intercourse with an alien enemy should take place unless by permission of the State'³ is subject to no exception, provided that one of the parties is an alien enemy in the eyes of the court before which the case is heard.

Prize Law—Exercise of Belligerent Rights after Termination of Hostilities—German Surrender on 4 May 1945

Case No. 7. *The Hermes and Four Hulls*, [1951] 2 T.L.R. 54. On 2 May 1945 Lübeck was captured from the Germans. Emden was captured on 6 May and Flensburg on 10 May. On 4 May the German Army Group for the north-west area of Germany surrendered, and on 8 May the total surrender of all the German armed forces was signed in Berlin. When Emden was captured, the *Hermes*, a German motor-vessel, was lying there in the water incomplete, damaged, and grounded. When Lübeck was captured, hulls 347 and 348 were found on the stocks in a fairly advanced stage of construction. When Flensburg was captured, hulls 507 and 508 were found on the stocks in an early stage of construction. In each case the Allied forces paid no particular attention to the *Hermes* or to the hulls, but appointed naval officers to control the ports concerned. By a declaration of 5 June 1945, the Allied Powers took over the government of Germany. Writs for the condemnation as prize of the *Hermes* and of the Lübeck and Flensburg hulls were issued in 1947. The owners of the *Hermes* claimed the release of their ship on the ground that she had never lawfully been seized in prize. The shipbuilders of the Lübeck hulls claimed that their yards were not part of the port, and that the hulls were not of such a maritime structure as to be capable of seizure in prize; further, that shipbuilding yards were private property and so protected by the Hague Convention. Similar claims were made in respect of the Flensburg hulls, and it was contended in addition that, as Flensburg was not occupied until two days after the total surrender of the German armed forces, there was no right of seizure in prize there at all.

It was *held*, by Lord Merriman, President of the Probate, Divorce, and Admiralty Division, that the *Hermes* and the hulls were all proper subjects of capture in prize and were lawfully condemnable. The Crown enjoyed the right of seizure in prize until this right was abrogated by the declaration of 5 June 1945. The President confirmed that 'it is, of course, well settled that belligerent rights in prize end with whatever may be the true cessation of hostilities', but, in his view, the events of 4 May and 8 May did not amount to a 'true cessation of hostilities'.

'This', he said, 'may be tested by considering what happened to these ports after the surrender. So far from there being any obligation on the Allies to lay down their arms, it is, I think, indisputable that, as in the case of the boarding party on the one hand or the landing party on the other, the naval and military forces which occupied these ports advanced, figuratively speaking, in full panoply with all appropriate precautions to

¹ (1948), 32 Hong Kong Law Reports 121.

² [1943] A.C. 203.

³ *Per* Scrutton L.J. in *Tingley v. Müller*, [1917] 2 Ch. 144, at p. 171.

guard against surprises and, if necessary, to impose their will on the surrendered enemy. Even if no force was openly displayed, it was there in reserve. . . . This, it seems to me, is the very antithesis of an implied contract that both sides shall refrain from any hostile act, and bears no resemblance to an armistice arranged on the terms that neither side shall do any belligerent acts so long as it lasts.'

The President refused, however, to say where the line should be drawn.

'Is it to be suggested that the victors can continue seizing ships and goods in prize until the peace treaty is signed—it may be years later? I do not consider that any such conclusion necessarily follows. I do not doubt that, short of the signing of a peace treaty, victors may abrogate, expressly or impliedly, any rights that they may have *jure belli*, including rights of prize.'

The President interpreted the declaration of 5 June 1945 as such an abrogation. It is suggested, however, that the position is that, in the absence of express or implied abrogation, the rights of prize survive until the signing of the peace treaty, no matter how long that may be delayed. But as the years pass by, without any sign of hostilities, it may become reasonable to infer an implied abrogation, even though there may have been no express abrogation.

With regard to the character of the structure in question, the President found that the *Hermes* was unquestionably a ship; that the shipbuilding yards were part of the ports in question (although it had been contended that a shipbuilding yard, as distinct from a ship-repairing yard, was not part of a port); and that the hulls, being 'maritime property in a maritime town' and being 'captured bodily when the ports in which they lay were captured' were proper subjects of capture in prize. The President, rejecting the argument that there were only two distinct subject-matters of prize, namely, 'ships' on the one hand and 'goods' on the other, referred to the following passage from Story's *Notes on the Principles and Practice of Prize Courts* (at p. 28), quoted with approval by Sir Samuel Evans, P., in *The Frederick VIII*:¹ 'the ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea, *jure belli*; to captures in foreign ports and harbours; to captures made on land by naval forces, and upon surrenders to naval forces; and this whether the property so captured be goods, ships or mere choses in action. . . .'

The most difficult aspect of the case concerned the question whether in fact there had been a 'capture' at all of the *Hermes* and of the four hulls before the critical date, 5 June 1945. It was contended by the claimants, first, that capture must be an act of conscious volition, and that no such capture could be said to have taken place at least until 1947 (i.e. the date of the issue of the writ in prize), when it was already too late; and, secondly, that there could not be a formal seizure at a later date of things which were said to have been seized informally at an earlier date. The President, however, held that an act of conscious volition was not necessary to a capture in prize. He found authority in the case of *The Progress*,² where Sir William Scott said in clear terms:

'I think I may consider it as decided in fact, that the French had captured these ships, and were actually in possession of them; it is not necessary to shew that they had taken formal possession of each individual ship, because they had possession of the port itself; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves. It is likewise clear in point of principle, that it is not necessary that it should be primarily the intention of the captor to recover the property.'

Further authority was to be found in the President's own decision in *The Bellaman*,³ where it held that two ships found lying in Tripoli harbour, when the Allies captured the port in 1943, were seized as good and lawful prize as from that date, although the formal steps of capture were not taken until 1947.

¹ [1917] P. 43 at p. 45.

² (1810), Edw. 210.

³ (1948), 1 Ll.P.C. (2nd) 265.

Prize Law—Seizure of Goods on Land—Proceeds of Goods Liable to Condemnation.

Case No. 8. *The Coburg* (1950), 1 Ll.P.C. (2nd) 286. *The Coburg*, a German ship, was found scuttled in the port of Massowah when the port was surrendered to British Forces in April 1941. Her goods had already been discharged and sold by the Crown. The Crown asked for a decree of condemnation of the proceeds of the sale of the goods.

It was held, by Hodson J, that the proceeds of the sale of the goods were condemnable as good and lawful prize, following upon the decisions in *The Glenroy*¹ and *The Achilles*². The decision of Hodson J. is brief and entirely based on the previous judgments, which were handed down towards the end of the First World War. In *The Glenroy*, a British ship, bound from Shanghai for Antwerp and Rotterdam, was diverted after the outbreak of war to a British port. Her cargo included bags of seed shipped by a German firm 'to order, Rotterdam'. After arrival in London, the seed, being unclaimed and perishable, was sold by the shipowners. The proceeds were handed over to the Admiralty Marshal by whom they were seized as prize. Sir Samuel Evans held that as the goods 'had been subject to seizure and condemnation when they remained in specie, their proceeds—nothing else having intervened to change their ownership—are also subject to condemnation'. In *The Achilles*, on similar facts, Lord Sterndale admitted that *The Glenroy* decision was 'an extension to a considerable extent of the old doctrine of seizing goods. I doubt very much whether under the old doctrine, when goods were once gone, and the goods themselves could not be seized, any seizure would have been allowed; but circumstances change and the principles upon which the Court acts have to be adapted to changed circumstances.' The judgment of Hodson J., therefore, contains no new principle. The change, if change it was, really took place in *The Roumanian*,³ where it was held by the Judicial Committee of the Privy Council that petroleum which had already been pumped into tanks on shore, was just as much liable to seizure as prize as it would have been when on board.

Enemy Character of Persons—Denationalization Decrees of Enemy State—Recognition of—Annexation of Austria by Germany—Application for Extension of a Patent by a Person Held to be a German National

Case No. 9. *In the Matter of Mangold's Patent* (1951), 68 R.P.C.1. In this case a person who was an Austrian national at the time of the *Anschluss* (March 1938) and who had been resident in the United Kingdom since 1937 (though an unsuccessful applicant for naturalization as a British subject), applied by originating summons in the Chancery Division for an extension of a patent. Section 24 (1) of the Patents Act, 1949, provides that the court or the comptroller may by order extend the term of a patent if the patentee has suffered loss or damage by reason of hostilities between His Majesty and any foreign state. Section 24 (8) of the same Act, however, provides that no order shall be made, *inter alia*, on the application of a person who is a subject of such a foreign state as is mentioned in Section 24 (1) (i.e. if the person concerned is a national of an enemy state), and that no account shall be taken of any loss or damage suffered by any person during any period during which he was such a subject. The question, therefore, was whether the applicant was the national of any enemy state.

In March 1938 Germany invaded Austria and proclaimed the annexation of Austria. On 2 April 1938 His Majesty's Government recognized this annexation. On 3 July 1938 a German Decree was issued granting German nationality to all Austrian nationals. On 3 September 1939 His Majesty declared war on Germany and on 8 May 1945 the German armed forces surrendered unconditionally. On 1 November 1943 the Governments of the United Kingdom, the U.S.A., and the U.S.S.R. issued the Moscow Declaration, stating, *inter alia*, that the German annexation of Austria was 'null and void'. On 5 January 1946 His Majesty's Government recognized the existence of Austria as a state and on 16 September 1947 the formal state of war between His Majesty and Austria was terminated.

¹ 7 Ll.P.C. 200.

² 7 Ll.P.C. 12.

³ 2 Ll.P.C. 378.

It was *held*, by Lloyd Jacob J., that the summons must be dismissed. The applicant became a German national upon the annexation of Austria and so was the subject of a foreign state at war with His Majesty. Consequently, by virtue of Section 24 of the Patents Act, 1949, he was not entitled to obtain an extension of his patent on the ground of war loss. The determining factor in the case, according to the learned judge, was the applicant's German nationality, according to German municipal law, on 3 September 1939. It is not stated in the report whether the applicant was a Jew and was therefore covered by the terms of the 1941 German Decree, which purported to deprive of their German nationality all German Jews living abroad. Be that as it may, it is submitted that it was unfortunate that the learned judge went out of his way, some years after the end of hostilities, to follow Lord Caldecote's decision in *R. v. Home Secretary, Ex parte L.*,¹ by confirming that 'any German decree which purported during the war to relieve German nationals of their allegiance is not one which the courts of this country will recognise'. The decision in the *Ex parte L.* case has been much criticized and has been defended, if at all, on the grounds of special war-time public policy. These grounds no longer apply. Another way in which the *Ex parte L.* case could have been distinguished was that, whereas in that case the applicants apparently did not leave Austria until towards the end of 1938, in *Mangold's* case the applicant left Austria as early as 1937. In a decision which has earned widespread approval, the United States Court of Appeals for the Second Circuit held, that, under international law, Germany could impose German citizenship by annexation or subsequent decrees of collective naturalization only upon Austrians who were actually 'inhabitants' of Austria in 1938, and therefore not upon the relator who arrived in the United States in 1936.² It seems therefore that it would have been possible to hold that Mangold never became a German national at all, quite apart from the consideration whether it was or was not possible for him to divest himself of German nationality after 3 September 1945.

In any case the rigid view taken by the learned judge concerning the effect of possessing German nationality under German municipal law on 3 September 1939 certainly did violence to the successive steps taken by His Majesty's Government, from 1943 onwards, to undo the legal consequences of the *Anschluss* and to mitigate the hardships caused thereby to Austrian nationals. In November 1943 the German annexation of Austria was declared to be 'null and void'. On 16 December 1943 the Home Secretary stated in the House of Commons: 'I have decided that any alien now registered as German who can furnish to the police with whom he is registered satisfactory evidence that he possessed Austrian citizenship when Germany annexed Austria may, on application, be registered as Austrian.'³ On 16 September 1947, when the state of war with Austria was terminated, it was declared, for example, that contracts concluded after that date between persons in the United Kingdom and persons in Austria would 'be in the same position as contracts concluded with persons in any friendly country, and no obstacles will be raised in connexion with them by reason of the fact that a formal state of war has previously existed between the United Kingdom and Austria'. It seems hardly satisfactory that considerations such as these, indicating a fundamental change in the relations between the United Kingdom and Austria, should have carried no weight as compared with the fact that an Austrian, who had left Austria for England in 1937, happened to be a German national according to German law in 1939.

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¹ [1945] K.B. 7. For a criticism of this decision see this *Year Book*, 23 (1946), pp. 378-9, and Lauterpacht, 'The Nationality of Denationalised Persons', in *Jewish Year Book of International Law* (1948), p. 164. See also *Löwenthal and Others v. Attorney-General*, [1948] 1 All E.R. 295; (1948), 64 T.L.R. 145; discussed in this *Year Book*, 25 (1948), at p. 425.

² See *U.S. ex rel. Schwarzkopf v. Uhl*, reported in *American Journal of International Law*, 37 (1943), p. 634, and *Annual Digest and Report of Public International Law Cases*, 1943-5, Case No. 54.

³ *Hansard, House of Commons Debates*, vol. 395, col. 1677.

B. PRIVATE INTERNATIONAL LAW

Divorce and Nullity

Case No. 1. The decision in *Maheer v. Maheer*, [1951] P. 343, confirms the principle, first enunciated in *R. v. Hammersmith Superintendent Registrar of Marriages*,¹ that a Christian marriage cannot be dissolved, in the eyes of English law, by a method of divorce appropriate to a polygamous union.

A Mohammedan domiciled in Egypt went through a ceremony of marriage in England with an English girl whose premarital domicile was in England. The parties intended to settle permanently in Egypt after the husband had completed his studies in England. The husband, however, returned to Egypt alone and purported to dissolve the marriage by appearing before the Cairo Court of Personal Status with two witnesses and making a formal declaration of divorce. The wife, who had remained resident in England, subsequently petitioned for a divorce on the grounds of her husband's desertion; the petition was undefended.

Barnard J. *held*:

1. Upon expert evidence, that the divorce which the husband had obtained in Cairo was in accordance with the Mohammedan religion and would be recognized as a valid divorce in Egypt.
2. That the divorce was not contrary to natural justice by reason of the fact that the wife had no notice of the proceedings. The decisions in *Shaw v. Attorney-General*² and *Rudd v. Rudd*,³ on which counsel based his contention that the divorce should not be recognized, were distinguished as being based primarily on want of jurisdiction in the original court rather than on lack of sufficient notice. Moreover, in this particular case, there were in fact no divorce proceedings and the wife could not have contested the unilateral declaration of divorce even if she had been put on notice.
3. That the marriage contracted in England was a monogamous marriage in the Christian sense, which could not be dissolved by a method of divorce appropriate to a polygamous union.
4. That the marriage therefore subsisted, but that, as the charge of desertion had been proved, a decree nisi would be granted to the petitioner.

The main point of interest in this case is that further impetus is given to the theory that, just as an English court will refuse to grant matrimonial relief in respect of a polygamous marriage,⁴ so will it also refuse to recognize, in respect of a monogamous marriage, a form of matrimonial relief suitable to a polygamous union. The decision, however, is not altogether satisfactory. It was quite clear in this case that the Cairo divorce would be recognized in Egypt, which was the domicile of the husband. This being so, it is difficult to understand why a change of status recognized by the law of the parties' domicile should not be recognized in England. There can be no doubt that an English court will recognize a foreign divorce decree obtained in the courts of the parties' domicile, even if the grounds for the divorce would not constitute grounds for a divorce in England.⁵ There is also authority for the proposition that absence of a judicial decree, which was advanced as one of the reasons for the decision in the *Hammersmith Marriages*⁶ case, is no longer regarded as being fatal to recognition of a foreign divorce in England.⁷ If, therefore, both the grounds for the divorce and the method of obtaining the divorce are to be regarded as being governed exclusively by the law of the parties' domicile, it is difficult to see why an English court should refuse to recognize a divorce of this nature.

¹ [1917] I.K.B. 634.

² (1870), L.R. 2 P. & M. 156.

³ [1924] P. 72; noted in this *Year Book*, 7 (1926), p. 222.

⁴ *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130.

⁵ *Bater v. Bater*, [1906] P. 209 at p. 217; *Metzger v. Metzger*, [1936] 3 All E.R. 130; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

⁶ [1917] I.K.B. 634 at p. 659, following *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

⁷ *Sasson v. Sasson*, [1924] A.C. 1007.

Case No. 2. *Igra v. Igra*, [1951] P. 404, is the first important case in which the principle evolved in *Schuck v. Schuck*¹ (that an English court can make a declaration that a foreign decree of divorce is valid) has been followed. This case is also interesting in that it severely limits the scope of the theory that a foreign decree of divorce, valid in all other respects, will be refused recognition in England if contrary to 'natural justice'.

The facts of the case were that the wife obtained a divorce from her husband in Berlin in 1942, the husband being at that time resident in England as a refugee. The husband had no notice of the proceedings and it was probable that the proceedings were influenced by racial bias, but there was no doubt that by German law the decree was valid. The jurisdiction of the German courts to pronounce the decree was not contested, presumably on the ground that the husband was still domiciled in Germany in 1942. In 1947 the parties lived together in England as man and wife, both believing the divorce to be invalid, but they later separated; in 1950 the husband remarried in the United States. The wife petitioned for an injunction on the grounds of jactitation of marriage² and in the alternative for a declaration that her marriage to the husband had been validly dissolved.

Pearce J. held:

1. That the wife was not entitled to the injunction, since at the time when the husband was proved to have held her out as his wife, she was in fact living with him and believed the divorce to be invalid.
2. That, despite the absence of service upon the husband, the German divorce was not contrary to 'natural justice' and was therefore entitled to recognition in England.

Pearce J., in considering whether the German divorce offended against 'natural justice' by reason of the absence of notice, considered and distinguished several earlier cases. He agreed with Barnard J.'s conclusion in *Maher v. Maher*,³ that the true *ratio decidendi* of *Rudd v. Rudd*⁴ and *Shaw v. Attorney-General*⁵ was want of jurisdiction, and pointed out that in *Boettcher v. Boettcher*⁶ a divorce decree pronounced in Indiana had been recognized in England, notwithstanding absence of notice, on the ground that the requirements of the law of Indiana as to service were similar to certain rules of English law relating to constructive service. He then noted that under the Matrimonial Causes Act, 1857, Section 42, an English court has a discretion to order substituted service or to dispense with service altogether, and suggested that 'we should [consequently] be slow to brand a foreign decree as contrary to natural justice (particularly when it was made in time of war) merely because notice did not in fact reach the applicant'.

The decision is to be commended for its frank recognition that the decisions of the courts of the domicile in matters of status should 'as far as reasonably possible' be accepted and acknowledged by other countries, and for its restrictive interpretation of what constitutes an offence against 'natural justice' for the purpose of denying recognition to a foreign divorce decree in England.

Case No. 3. The question whether Section 1 (1) of the Age of Marriage Act, 1929,⁷ which provides that 'a marriage between persons either of whom is under the age of sixteen years shall be void', has extraterritorial⁸ effect was the main point at issue in *Pugh v. Pugh*, [1951] 2 All E.R. 680. The interest in this case lies not so much in the actual decision given as in the reasoning employed by Pearce J. in reaching his conclusions.

¹ [1950] W.N. 264; reported in this *Year Book*, 27 (1950), p. 469.

² This is a remedy available to a party when some person asserts or boasts that he is married to that party contrary to the truth of the case; the petition prays for a decree of perpetual silence.

³ *Supra*, p. 408.

⁴ [1924] P. 72.

⁵ (1870), L.R. 2 P. & M. 156.

⁶ [1949] W.N. 83; noted in this *Year Book*, 26 (1949), p. 475.

⁷ S. 1 (1) of the Age of Marriage Act, 1929, was repealed by the Marriage Act, 1949 (s. 79 (i) and Sched. V, Part I), but was re-enacted by s. 2 of the latter Act.

⁸ 'Extraterritorial' in the sense that it enacted a personal incapacity which would attach to persons domiciled in England although they married outside England.

The wife, who had a Hungarian domicil of origin, left Hungary for Austria in 1945. She there met a serving British officer, with whom she went through two ceremonies of marriage, religious and civil; the wife was then fifteen years of age. Although they lived together at various places in Germany and Austria, it was the husband's intention after his service abroad to settle with his wife in England. In October 1950 they came to England, together with a child of the marriage, to stay permanently, but shortly thereafter they separated. The wife now petitioned for nullity on the ground that she was under the age of sixteen when she married the husband; alternatively, she petitioned for divorce on the ground of her husband's cruelty.

Two submissions were made on behalf of the wife:

- (a) The Age of Marriage Act, 1929, applies to the husband as a British subject, with an English domicil, wherever he marries, and renders the marriage void;
- (b) The essential validity of a marriage should be tested by the law of the husband's domicil, or alternatively the law of the intended matrimonial home.

Pearce J. upheld both submissions. His first task was to interpret the Age of Marriage Act, 1929, in the abstract. Was it or was it not intended to enact an incapacity of a general character that would attach to persons with an English domicil wherever they marry? The only cases which had any bearing on this problem were those in which the Marriage Act, 1835, which provided that marriages between persons within prohibited degrees of consanguinity shall be absolutely null and void for all purposes whatsoever, had been interpreted. Of these the most important was *Brook v. Brook*,¹ in which, despite the maxim 'extra territorium jus dicenti impune non paratur', it had been held that the Marriage Act, 1835, was a 'statute affecting persons'² which applied to British subjects domiciled in England wherever they happened to travel.³ Pearce J. was in no doubt that the interpretation put upon the Marriage Act, 1835, could be applied to the Age of Marriage Act, 1929.

'It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicil. It is right and reasonable that the country of domicil should (as it did by the Marriage Act, 1835) from time to time vary and affect the personal status of its subjects and their capacity to marry as changing religious, moral and social conditions may demand. I see no reason to put on the words any other limitation than the obvious one that they are not intended to apply to marriages abroad of persons who are not domiciled here and are not the concern of or subject to the laws of Parliament.'

In pronouncing upon the second submission Pearce J. referred to the various cases in which it had been held that capacity to marry is governed by the law of the premarital domicil of each of the parties, and concluded that 'in view of these authorities, it is clear that the marriage under consideration here was not valid, since, by the law of the husband's domicil it was a marriage into which he could not lawfully enter'.

The theory propounded by Professor Cheshire⁴ that all questions relating to the essential validity of marriage should be referred to the law of the intended matrimonial home receives little support from Pearce J.'s judgment.⁵ It would appear that capacity to marry is still, from the viewpoint of English law, primarily regulated by the law of the premarital domicil of each of the parties. It would be premature, however, to draw any firm conclusion from this case as to the significance of the 'intended matrimonial home' theory; the *lex domicilii* of the husband and the law of the intended matrimonial home were both English law, and it was therefore unnecessary to choose between them.

The case is, of course, only authority for the proposition that the incapacity imposed on

¹ (1858), 3 Sm. & G. 481; affirmed in the House of Lords (1861), 9 H.L. Cas. 193.

² (1858), 3 Sm. & G. 522, *per* Creswell J.

³ In *Mette v. Mette* (1859), 1 Sw. & Tr. 416, the principle laid down in *Brook v. Brook* was applied to a naturalized Englishman domiciled in England.

⁴ *Private International Law* (3rd ed.), pp. 266-79.

⁵ See Bresler in *International Law Quarterly*, 4 (1951), pp. 478-83.

persons domiciled in England by the Age of Marriage Act, 1929, applies to them wherever they marry; it is not necessarily authority for the proposition that the Act is also 'territorial' in its application in that it prohibits and renders void a marriage in England between persons both of whom are domiciled abroad, and one of whom, although under the age of sixteen, has nevertheless capacity by the law of his or her domicile to contract marriage. Although it is likely that an English court would hold that the Act was both 'personal' and 'territorial' in its application,¹ Pearce J. did not find it necessary to decide more than that the Act imposed an incapacity on persons domiciled in England, and that that incapacity attached to such persons wherever they happened to marry.

Foreign Judgments

Case No. 4. It has long been a recognized principle of English private international law that if a plaintiff has brought proceedings in a foreign court against a defendant for damages in respect of a particular cause of action and obtains a judgment which is satisfied, he cannot claim damages in respect of the same cause of action against the same defendant in the courts of this country.²

The question which Lynskey J. had to determine in *Kohnke v. Karger*, [1951] 2 K.B. 670, was whether the principle could be applied to a case in which the plaintiff has two separate causes of action against different defendants for the same damage and had obtained a satisfied judgment against one of them in a foreign court.

The plaintiff, a passenger in a motor-car, was injured in France in a collision between the car and a motor-lorry. Criminal proceedings were instituted against the lorry driver in the French courts, and in accordance with the provisions of French law both the plaintiff and the defendant (the driver of the motor-car) presented claims in these proceedings for damages in respect of personal injuries, but not in respect of damage to or loss of goods. Responsibility for the accident was apportioned as between the lorry driver and the defendant, and the French court awarded the plaintiff the equivalent of £1,428 which was duly paid by or on behalf of the lorry driver and his employers, the defendant later reimbursing them as to one-third of the amount paid in accordance with the apportionment of responsibility.

The plaintiff now brought proceedings for negligence against the defendant in England in respect of the same injuries and minor damage to her property, undertaking to give him credit for the damages she had received from the lorry driver and his employers. Counsel for the plaintiff argued that as the judgment against the lorry driver was *res inter alios acta* and as the damages awarded to the plaintiff in France were less than would have been awarded in an English court, the plaintiff was entitled to proceed against the defendant despite the fact that the judgment against the lorry driver had been satisfied. Counsel for the defence relied on the principle laid down in *Bird v. Randall*³ that where damage is caused by separate *injuriae* for which two or more persons are responsible, a satisfied judgment for that damage is a bar to further proceedings in respect of any *injuria* which caused the damage.

Lynskey J. held:

1. That the *Bird v. Randall* principle had never been applied to a case in which the satisfied judgment was that of a foreign court.
2. That the principles on which damages are assessed differ in the two countries, and that, as the assessment of damages is a matter for the *lex fori*, an English court is not bound by a French court's assessment of damages.
3. That the damages awarded by the French court were insufficient to compensate the plaintiff.
4. That, as the damages were insufficient by English standards and as there seemed to be nothing in principle to prevent the plaintiff from bringing an action in England

¹ See Beckett in this *Year Book*, 15 (1934), p. 65.

² *Barber v. Lamb* (1860), 8 C.B. (N.S.) 95; *Taylor v. Hollard*, [1902] 1 K.B. 676.

³ (1762), 3 Bur. 1345.

against one of two defendants, even though she had already obtained a satisfied judgment in the French courts against the other, judgment would be entered for the plaintiff.

In view of the plaintiff's undertaking, it was unnecessary for *Lynskey J.* to determine whether, in any secondary proceedings in England, the court would be bound to take into consideration, in assessing damages, the satisfied foreign judgment, but he gave it as his opinion that 'as the damages to which [the plaintiff] was entitled had been *pro tanto* satisfied by what she had received from the lorry driver, her damages must be reduced by that amount in her claim against the defendant'.

The effect of the decision would appear to be that where there are two causes of action against different defendants in respect of the same *damnum* and a satisfied foreign judgment has been obtained against one of them, an English court is entitled, if proceedings are brought against the other defendant in England and if the English court considers that the damages awarded by the foreign court are insufficient, to give judgment for the plaintiff in respect of the difference between the assessment of the foreign court and the assessment of the English court. This principle could not of course be applied if the plaintiff brought proceedings in England against the *same* defendant as had appeared in the foreign court on the issue of the measure of damages, for such a case would clearly fall within the principle laid down in *Barber v. Lamb*.

Although the *ratio decidendi* of the case is interesting, it is submitted that the distinction which *Lynskey J.* drew is rather too fine. The plaintiff had elected to take her remedy in the French courts and had obtained satisfaction for the damage which she had suffered in accordance with the provisions of French law. The fact that, under the provisions of English law, she had two separate causes of action against different defendants is a procedural peculiarity, and while it may be true that the issue of measure of damages should be a matter for the *lex fori*¹, it is surely illogical that a foreign judgment cannot be attacked on this issue when proceedings are brought in England against the same defendant, but can be attacked when, according to *English* law, there is a separate cause of action against a different defendant, even though that cause of action may not exist in the law of the country where the foreign judgment is given.

Guardianship of Infants

Case No. 5. The question of how far a foreign decree of custody is entitled to recognition in the eyes of English law was the main point at issue in *McKee v. McKee*, [1951] A.C. 352. The parties were American citizens, married in America. After the birth of their son they separated and later executed an agreement which provided that neither of them should remove the child out of the United States without the written consent of the other. In subsequent divorce proceedings in California the custody of the child was awarded to the father, but the order was later modified to give full custody to the mother, subject to the right of reasonable access by the father. Thereafter, the father removed the child to Ontario, and the mother, having at last traced their whereabouts, instituted habeas corpus proceedings in the Supreme Court of Ontario. Wells J., after a full and careful investigation of the circumstances, gave sole custody of the infant to the father. This judgment was approved by a majority of two to one by the Court of Appeal for Ontario, but was later reversed by a majority of four to three in the Supreme Court of Canada. The father now appealed to the Privy Council, which reversed the judgment of the Supreme Court of Canada.

Lord Simonds, in delivering the judgment of the Judicial Committee, referred to the various Canadian decisions and stated that there could be no doubt that the courts of Ontario had jurisdiction to decide the issue of custody:

'The infant was resident, if not domiciled, in the Province: he was within the King's allegiance and entitled to the protection of his courts: he was an infant and therefore entitled to the special protection owed by the King as *parens patriae* to infants.'

¹ Cheshire, *Private International Law* (3rd ed.), pp. 856-7.

His Lordship then reviewed and commended the manner in which Wells J. had tried the custody issue, and stated that the two considerations which had led to the reversal of Wells J.'s order by the Supreme Court of Canada were:

- (a) that the father's action in taking the infant out of the United States was a breach of the separation agreement;
- (b) that it was also a deliberate evasion of the order of the Californian court giving custody to the mother.

Lord Simonds did not deny that the father had deliberately evaded the order of a foreign court of competent jurisdiction, but he strongly repudiated the notion that such a deliberate evasion should affect the right of an Ontario court to determine the issue of custody afresh from the point of view of the welfare of the child:

'It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded—namely, that the infant's welfare is the paramount consideration—to say that where the learned trial Judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the Court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in so doing it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case.'

In reviewing the various authorities on recognition of foreign orders of custody, His Lordship reiterated the principle that the welfare and happiness of the infant is the paramount consideration in questions of custody, and asserted that, where there is in existence an order of a foreign court, 'comity demands, not its enforcement, but its grave consideration'. He explained the observations of Page Wood V.C. in *Nugent v. Vetzera*¹ and of James V.C. in *Di Savini v. Lousada*² by asserting that neither judge had intended an abdication of the jurisdiction of his court to appoint guardians. Their Lordships approved the statement of the law made by Morton J. in *In re B.'s Settlement*,³ but considered that too much stress should not be laid on the provisions of the Guardianship of Infants Act, 1925, Section 1 of which introduced no new principle of law but merely enacted the rule which had long been acted on in the Chancery Division.

The reasoning of their Lordships is not open to criticism, but the decision is perhaps open to the objection that it encourages the evasion of foreign orders of custody. It is of course true that the issue in every case of this type is the welfare of the child, but it could be argued that, as the foreign court has presumably taken due account of the welfare of the child in making its order, that order should *prima facie* be enforced unless there are compelling circumstances to the contrary. At the moment, it is clearly profitable for an unsuccessful applicant for custody in a foreign suit to take the infant to England in defiance of the foreign court and, by prolonged litigation, to gain such *de facto* control over the child as to make it probable that an English court will decide that the welfare of the child would best be served by ignoring the foreign order. A less accommodating attitude on the part of the English courts might well discourage abducting parents from fleeing to England in defiance of a foreign custody order.

Legitimacy

Case No. 6. The case of *Gatty (F.A.) and Gatty (P.V.) v. Attorney-General*, [1951] P. 144, confirms the view that, where there has been a marriage followed by a divorce and

¹ (1866), L.R. 2 Eq. 704.

² (1870), 18 W.R. 425.

³ [1940] Ch. 54.

subsequent remarriage of one of the parties, the burden of proving the validity of the second marriage rests upon the person seeking to prove it, and that proof of the formalities of the second ceremony followed by a long period of cohabitation is not sufficient to shift the burden of proof. It also disposes of the contention that a person can acquire a domicile of choice in the United States of America without reference to a particular state; proof of residence and *animus manendi* in the United States generally is insufficient for the purpose of acquiring a domicile of choice.

The parents of the petitioners in a legitimacy suit went through a ceremony of marriage in Canada in 1897 shortly after the father had divorced his wife in North Dakota, having resided there long enough to satisfy the jurisdictional requirements of that state. The petitioners were born in 1898 and 1901 respectively and the parents lived together for nearly thirty years until the death of the father. Although the father's domicile of origin was English, evidence was adduced to show that in 1897 he had acquired a domicile of choice in North Dakota, or alternatively in Massachusetts or New York.

The crucial question was on whom lay the burden of proving the second marriage; was it sufficient to prove the marriage good as to formalities and period of cohabitation? Karminski J., relying on *MacDermid v. Attorney-General*,¹ held that in view of the existence of a decree of divorce, whose recognition in England was open to doubt, the burden of proof still lay on the petitioner. This was of particular importance in this case, where, all the material facts having taken place over fifty years ago, it was exceedingly difficult to determine the issue of domicile, on which the validity of the North Dakota divorce depended.

Of more general interest are Karminski J.'s observations on the possibility of acquiring a domicile of choice in the United States of America without reference to any particular state. Although he was not satisfied that the petitioners' father had in 1897 abandoned his English domicile of origin, and indeed decided the case on this point, he referred with approval to the Canadian case of *Trottier v Rajotte*,² which established that a person cannot acquire a domicile of choice in the United States generally.

There can be little doubt that theoretically this conclusion is inevitable. Each state of the Union has a separate legal system and is therefore capable of supplying a separate personal law. Nevertheless, in view of the fact that, in general, divorces granted by one state of the Union are, by virtue of the 'full faith and credit' clause of the Constitution, recognized in all other states of the Union, there is some force in the suggestion that, for the purpose of recognition of American divorces in England, the acquisition of a domicile of choice in one of the states of the Union should not be put to such strict proof when there is evidence of intention to remain in the United States indefinitely plus the necessary *factum* of residence.

I. M. SINCLAIR

¹ [1950] P. 218: this case decided that, on a petition for legitimacy, the onus is on the petitioner, whose father or mother was married to a third person before the petitioner's birth, to prove facts from which the cessation of the earlier marriage before that birth may be inferred.

² [1940] 1 D.L.R. 433.

REVIEWS OF BOOKS

The American Journal of International Law. Volumes 44 and 45. Lancaster, Pa: The American Society of International Law. 1950 and 1951. \$7.50 each.

The two latest volumes of the *American Journal of International Law* offer, as always, a rich fare for all interested in the subject. Following a now established pattern, the volumes contain leading articles, editorial comment and current notes (the distinction between which appears to be based on authorship rather than subject-matter), judicial decisions, book reviews, and, in a separate section, official documents. Particularly welcome is the fact that Dr. Yuen-li Liang's 'Notes on Legal Questions concerning the United Nations' have, like Professor Hudson's analysis of the work of the International Court, become a regular feature of the *American Journal*. In that manner they provide a picture of the problems arising in the daily work of an International Organization.

It is impossible to do justice to all the valuable articles and notes contained in the two volumes, but two or three must be singled out for mention. Professor Lawrence Preuss's study of 'The Relation of International Law to Internal Law in the French Constitutional System' is a model of learning and judicious interpretation. It is a matter for regret that we do not more frequently have the opportunity of seeing products of his work, which has exerted a weighty influence in favour of the acceptance of the overriding authority of international law. Similar in concern for the strengthening of international law by means of the municipal enforcement of its precepts is Professor Quincy Wright's exposition of the *Fujii* case, in an article entitled 'National Courts and Human Rights'. That article contains not only a masterly analysis of the relevant provisions of constitutional and international law, but also a thoughtful examination of the issues of legal policy arising out of judicial boldness in the matter of human rights. Totally different in method, and yet similar in motive, is Professor Kelsen's devastating analysis of 'The Draft Declaration on Rights and Duties of States'. Some readers may feel that the criticisms of the Declaration are too destructive, but it is a service to the authority of international law as law to draw attention to the essential meaninglessness of provisions which lay down that states have 'the duty to carry out obligations arising from . . . international law'.

Special mention should also be given to the section on judicial decisions, ably compiled by Mr. William Bishop. The value of this is all the greater in view of the fact that United States law reports are not easily accessible, while there is an inevitable time-lag in the publication of the *Annual Digest and Reports of Public International Law Cases*. However, in order to make this section the useful tool it is intended to be, a number of improvements could still be made. In particular, judgments might be reported more fully, or, as an alternative, analysed in the manner adopted by this *Year Book*; the present method of digesting occasionally provides an inadequate picture of the decisions given. Moreover, if there is a problem of space in this connexion, consideration might be given to the question whether it is necessary to report cases other than those decided by United States tribunals. The decisions of the International Court, for instance, are easily accessible elsewhere, and the decisions of the national tribunals of other countries are to be found in national periodicals of international law.

All in all, these two volumes demonstrate that the *American Journal of International Law* continues to be one of the leading periodical publications in the sphere of international law. An earnest wish that it should remain so prompts one final reflection.

There has recently been some tendency towards the inclusion of articles, such as Professor Steiner's article on 'Mainsprings of Chinese Communist Foreign Policy', which, whatever their intrinsic merit, are primarily of political, not legal interest. It is to be hoped that the *American Journal* will retain its position as a technical periodical of law rather than seek the wider interest which is accorded to a periodical of 'international affairs'.

F. M.

Annual Digest and Reports of Public International Law Cases, 1946. Edited by H. LAUTERPACHT, Q.C., LL.D., F.B.A. London: Butterworth & Co. (Publishers) Ltd. 1951. xxiv+437 pp. £2. 15s. net.

Annual Digest and Reports of Public International Law Cases, 1947. Edited by H. LAUTERPACHT, Q.C., LL.D., F.B.A. London: Butterworth & Co. (Publishers) Ltd. 1951. xxiv+335 pp. £2. 15s. net.

These volumes, which appeared simultaneously, mark a new departure in that they include decisions published in the course of a single year only. Professor Lauterpacht who, together with his collaborators, has again done great service to the study of international law by editing these reports, explains in the Preface to the 1946 volume (p. vii) that annual reports in the strict sense will become a permanent practice. This is indeed welcome news, but will, it is feared, impose a still greater burden on an already overburdened Editor, particularly if he should aim at eliminating the time-lag which at present exists.

The volumes for 1946 and 1947 follow the by now well-tried pattern which has helped to establish this series as a necessary instrument of research. Their principal features lie in the almost complete absence of decisions of international tribunals and the preponderance of cases arising out of warfare. The former class is represented by two out of a total of well over three hundred cases. The first (No. 91 of 1946) is a decision of the Administrative Tribunal of the League of Nations which held that, in the absence of express terms, a Resolution of the League altering the terms of employment of League officials could not be construed as interfering with vested contractual rights; the decision makes convincing reading and it is discouraging to observe from the Editor's note that the League refused to give effect to it. Case No. 137 in the 1947 volume is an Award on the effects of the twenty-four hours' rule as applicable to certain Italian ships which entered Spanish harbours after the armistice between Italy and the United Nations; the case was an important one, but unfortunately the Arbitrator's reasoning cannot always be followed with ease.

As to the law of war, it is the law of criminal responsibility and of belligerent occupation that accounts for a substantial part of these volumes. Apart from a masterly summary of the Judgment of the International Military Tribunal at Nuremberg there are many reports of national Military Tribunals or other criminal courts; the *Digest* for 1946 contains the important decision of the Supreme Court of the United States in *Re Yamashita* (No. 115), while in the *Digest* for 1947 the reader will find a useful note on the jurisdiction of Military Tribunals (pp. 292 ff.). The reopening of the courts in the territories of the United Nations presented them with a flood of litigation arising out of the enemy's administration. The study of these numerous decisions from Norway to the Philippines, from Italy to Burma, impresses the reader again with the urgent necessity for a comprehensive book on the law of belligerent occupation—a book that will have to collect as well as to analyse the material accumulated during and after two world wars. Another aspect of the law of warfare is illuminated by a number of decisions

on the status of prisoners of war; to mention one of the many interesting decisions on this problem, reference should be made to *Re Territo* (No. 117 in the 1946 volume) which is a better case than any examiner could have invented: after Italy had joined the war against Germany a petition for habeas corpus was brought by a United States citizen who, when serving with the Italian Army, was taken a prisoner of war and, while in the United States, joined an Italian Service Unit. The Circuit Court of Appeals (9th) dismissed the petition.

In so far as the general law of peace is concerned, these volumes contain not less interesting material. According to his predilection every reader will wish to see particular cases selected for special emphasis. While he realizes the subjective character of his choice, this reviewer can only comment on very few decisions. Case No. 5 of 1947 is an unfortunately abbreviated report of *Bernstein v. van Heyghen*, one of the most remarkable decisions on the 'political question'; incidentally, the Supreme Court of the United States denied *certiorari* (see 332 (1947), U.S. 772), but, on the other hand, by letter dated 13 April 1949, the Department of State clearly disavowed the political decision which the Circuit Court of Appeals (2nd) paradoxically made by trying to avoid a political decision. The converse situation is represented by *Connell v. Vermilya-Brown Co.* (Case No. 18 of 1947) where the Circuit Court of Appeals (2nd) and a majority of the Supreme Court had no hesitation in deciding that the areas in Bermuda leased to the United States were 'territory or possessions' of the United States within the meaning of the Fair Labor Standards Act, although the Department of State had indicated its disapproval of such a result. The lesson is that for judges to depend on the Executive means treading a slippery path. In *Inouye Kanao v. The King* (No. 39 of 1946) the Hong Kong Court held that the accused, who was both a British and a Japanese subject, was for the purposes of the law of treason a British subject. 'Dual nationality is not half one and half another but two complete nationalities'. It is a pity that this sound principle was disregarded in the regrettable decision in *Kramer v. Attorney-General*, [1923] A.C. 528. Case No. 59 of 1946 is a decision of the French Cour de Cassation to the effect that the abrogation of Nazi law has reimposed German nationality on a stateless refugee of German origin. In Case No. 54 of 1947 the Paris Court of Appeal arrived at the opposite result, with which the Cour de Cassation in a more recent decision agrees (20 December 1950, S. 1951. 1. 89). A similar change occurred in Switzerland (No. 58 of 1946). Case No. 103 in the 1947 volume is a decision on the status of British Military Government in Berlin which at the time of its publication created a sensation and by its reliance on the Hague Regulations put the whole of military law in Germany into the melting-pot. In the 1947 volume one will also find the already well-known decision of the Court of Appeals (2nd Circuit) establishing the immunity of a diplomat *in transitu* (No. 73).

These are only a few pointers to the rich contents of the two new volumes, but it is hoped that they convey an idea of the instruction and stimulation which are once more to be derived from the *Digest*.

F. A. MANN

Lectures on the Conflict of Laws and International Contracts. Delivered at the Summer Institute of International and Comparative Law, University of Michigan Law School, 1949. Ann Arbor: University of Michigan Press. 1951. xiv+200 pp. \$3.

Under the auspices of the Law School of the University of Michigan an Institute on International and Comparative Law was held at Ann Arbor in August 1949. The

present volume contains seventeen lectures delivered by ten guest lecturers on Conflict of Laws and International Contracts. Most of them are in the nature of surveys and reports; they therefore do not amount to, or aim at, an original contribution to a field which, at present, cannot perhaps yield a harvest of a novel character and indeed may stand in some danger of being overworked. Some readers of this *Year Book* are likely to reflect regretfully that public international law does not enjoy similar popularity or facilities.

The volume contains three essays by Dr. Rabel on 'International Sales Law', 'Agency', and 'Conflicts Rules on Contracts'. The French representative, Professor Battifol, spoke about 'Assignment, Form and Capacity in International Contracts' and 'Public Policy and Contracts', the last-mentioned paper containing a particularly well-balanced discussion of a problem which in recent days has attracted considerable attention. Signore Matteuci lectured on the 'Representation of Bondholders in International Loan Contracts' and also on the 'Unification of Conflicts Rules'. Further contributions come from the pens of Professors Cowan ('Indeterminacy in the Conflict of Laws'), Freund ('Characterization with respect to Contracts'), Rheinstein ('The Use of Foreign Materials in Teaching Conflict of Laws'), Steinberg ('Jurisdiction of Courts'), and Cheatham ('A Federal Nation and the Conflict of Laws').

The British representatives were Mr. Zelman Cowen, then Fellow of Oriel College, Oxford, who spoke on the 'Conflict of Laws in Australia and the United States' and thus, like Professor Cheatham, dealt with the peculiar aspects of the matter within a federal Constitution, and, in particular, Professor Graveson. The latter gave three lectures, viz. on the 'Proper Law of Commercial Contracts in the English Legal System', 'Discharge of Foreign Monetary Obligations in the English Courts', and 'Bills of Lading and the Unification of Maritime Law'. It is the last-mentioned paper which this reviewer, at any rate, found especially interesting. The author is fully aware of the need for uniformity and the reasons which, even within the framework of an apparently unified branch of the law, make it difficult to reach the goal. Much work can and ought to be done to eliminate or reduce the impact of those reasons. Professor Graveson is well qualified to do it and will, it is hoped, devote himself to the task.

Private international lawyers will be grateful to those whose energy and generosity permitted the publication of this handsome volume.

F. A. MANN

Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht. By R. L. BINDSCHEDLER. Zürich: Polygraphischer Verlag A.G. 1950. 127 pp.

This is a competent and scholarly *Habilitationsschrift* on the ever-present problems raised by nationalization and expropriation. The author reviews the literature and practice on the subject and rightly, in the reviewer's opinion, comes to the conclusion that the protection of lawfully acquired rights is still a function of international law (p. 25) despite one or two voices to the contrary such as that of the late Sir John Fischer Williams (p. 9). Undoubtedly, a state may tax, and punish by fine or even confiscation, within its territory (p. 26). However, in civilized countries such acts are not arbitrary measures. Even concessions and mortgages are lawfully acquired rights (pp. 31-32). So are claims, and the recent agreements concluded by Great Britain with Yugoslavia and Czechoslovakia admit that mere claims may be included in global compensation arrangements on nationalization. The author discusses indirect expropriation by devaluation, and suggests that he who deals in or uses a foreign currency must take the risk of devalua-

tion provided that the devaluation is not an abuse of law (p. 38). Political necessity may show that devaluation does not constitute such an abuse of law. The reviewer is unable to accept the traditional 'neutral' view, apparently supported by the author, according to which both parties to a war are equally entitled to destroy or damage property in military operations (p. 41). War cannot, it is suggested, be assimilated to a natural catastrophe. It is true that, during a war, the Hague Regulations do not make a distinction between a belligerent with a lawful case and an unlawful belligerent. However, since 1918 it has been the very basis of international organization, as well as of peace treaties, that after a war the belligerent acting unlawfully in starting the war may be held liable to make restitution and reparation for the damage done.

The author propounds some sound views on the nationality of claims (pp. 43-44) and on the nationality of corporations (p. 45). There is, indeed, much to be said for the view that any substantial interest is worthy of diplomatic protection.

The question of the amount and the calculation of compensation is well discussed (Chapter VI). The analogy of the *restitutio in integrum* as compensation for delictual wrongs is certainly acceptable, but there are many subsidiary questions such as in what currency and subject to what exchange restrictions payment is to be made (pp. 55-56). The author rightly cites the recently concluded Peace Treaties with former Axis satellites which allow payments as an act of grace to be subjected to exchange restrictions. He states the desirable rule in submitting that compensation should be made in a freely convertible currency.

As the author points out (at p. 57), when the totality of a state's economic system is nationalized payment in the national currency may be useless to a foreigner who cannot reinvest the sums due to him within that country and there may be no free market for that currency outside. Autarky leads to more autarky.

The author gives many examples of different national measures of compensation on nationalization, and points out that, as a result of the recent treaties between France and Switzerland, Swiss nationals may obtain more compensation for their shares in French gas and electricity undertakings than French subjects (p. 65). The local measure of compensation to nationals is not a sufficient guide to the objective assessment of the claims of foreigners on nationalization. The time of expropriation is suggested as the date on which to value the expropriated assets (p. 70). However, this is not an easy test to apply in the post-war world; in any case, the market value of shares at that date is not necessarily a fair value when the prospect of nationalization may have depressed the Stock Exchange. The chapter concerning the procedure to be adopted by claimants is interesting. Certainly the modern tendency has been for one Government to make global payments to another. But this only too often means that the claimant suffers a further loss when he has to accept whatever portion his Government permits him—a further expropriation in some cases. Mixed claims commissions and arbitral commissions are clearly the proper way for allowing detailed adjustments.

Dr. Bindschedler's work is warmly to be recommended for its careful treatment of a difficult subject.

B. A. WORTLEY

The Law of Nations. Cases, Documents and Notes. Edited by HERBERT W. BRIGGS. Second Edition. New York: Appleton-Crofts. 27+1108 pp. \$8.

This second edition, very considerably enlarged and revised, of Professor Briggs's book goes a long way towards making it the most valuable and useful case book in the field of international law. In fact, in the reviewer's opinion, that consummation has now

been achieved, and this substantial volume may safely be regarded as the best case book now available. But it is more than that. In more senses than one it is a treatise of international law, and with relatively little effort it could be cast in the form of a treatise accompanied by cases. For Professor Briggs's Notes are not mere bibliographical references. They contain a thorough and critical discussion of the various subjects illustrated by the cases and documents. The usefulness of the volume is increased by the last hundred pages referring to questions connected with war such as legal effects of war, in particular the effect of war on treaties, and war crimes. The Hague Convention on the Laws and Customs of War is reproduced in full. In the next edition, which it may be confidently expected will be soon forthcoming, the author may consider the desirability of incorporating some of the Geneva Conventions of 1949. There will also be general agreement with Professor Briggs's decision to print both the Charter of the United Nations and the Covenant of the League of Nations.

The price of the volume is such as to bring it within the means of students reading for examinations. It is to be hoped that they will make extensive use of that opportunity. At the same time this 'case book' is of inestimable value for the teacher and the student of international law in general. It represents a conspicuous achievement of scholarship on which Professor Briggs must be warmly congratulated.

H. LAUTERPACHT

The International Law of Recognition (with special reference to practice in Great Britain and the United States). By TI-CHIANG CHEN. Edited by L. C. GREEN, LL.B. London: Stevens & Sons Ltd. 1951. 460 pp. £4. 4s.

Professor Chen studied in Oxford under Professor Brierly and had to return to China to take up his Chair in the University at Peking before this work was quite completed. Mr. Green accepted the responsibility of seeing the work through the press and inserting further material, indicated by square brackets, so that the book should be up to date at the moment it appeared.

Professor Chen observes in his Preface that Professor Lauterpacht's book on Recognition appeared when his own work was well on the way. He hesitated in the circumstances whether to continue it but decided to do so because, although he found Professor Lauterpacht's book both an 'inspiration and a standard', the conclusions which he reaches are not on all points the same as those of Professor Lauterpacht. Professor Lauterpacht's book was reviewed in the 1947 number of this *Year Book* by the present reviewer, and it may therefore be of some interest to compare the reviews of the two works. Every serious student of international law should be glad that Professor Chen was not deterred from publishing his book, though in its broad approach and tenor the reviewer does not find the position of Professor Chen so different from that of Professor Lauterpacht.

Some time ago those who practised international law had some reason to complain that books on international law tended simply to express the views of the writer, expressed in a logical thesis deduced from first principles and with little, or comparatively little, reference to practice and authority to support the views expressed and a complete omission of references to practice and authority which did not fit in with the theory of the writer. Today, judging by the books which are being published in England, international law writers have, if anything, gone almost too far in the opposite direction. The work under review is studded with footnotes and references to authorities and practice. Almost every sentence has a footnote. The mere list of judicial decisions cited occupies nearly eight pages. The fault, if fault there be, is definitely on the right side, and, if

there were no other reason for practitioners and advanced students to welcome this book (and indeed there are other reasons), it would still be of great value because the reader is almost sure to find in it some reference to practice or authority on almost every point that can arise. The amount of painstaking research involved must have been enormous. If the present reviewer suggests that the present work may have gone a little too far in the right direction, it is perhaps because the references to practice and authority are at times rather indiscriminate. One might have preferred slightly fewer references and a greater assurance that all the references really supported the view which they are cited to support. In a few cases, where the references are to matters within the reviewer's personal knowledge, it is at least possible to take the view that the authority cited can better be explained in another way and does not really support the view for which it is cited.

Works like the *Annual Digest of International Law Cases* perform an almost indispensable service in bringing to notice judicial decisions all over the world which may have a bearing on a question which is being studied. The earlier volumes of the *Annual Digest* (the more recent volumes contain much fuller summaries) generally adopt the method of giving a quotation of the *ipsissima verba* of a small portion of the judgment. But there is a certain danger in the *ipsissima verba* method because, in order fully to appreciate its effect, the quotation must be read in its context in the light of the issues which the court really had to decide and of the arguments which were before the judge. When the case is read in this way, it will sometimes appear that the words actually quoted are hardly authority for what they appear to be. Moreover, often they are rather in the nature of *obiter dicta* and do not represent any part of the real *ratio decidendi* of the case. When one adds to this the fact that a municipal judge is not *ex officio* an expert in international law, and that, for one reason or another, it is quite probable that the international law issues were not argued very adequately before him, it will be seen that the amount of weight which must be put on a passage in the judgment of a municipal court on a point of international law must depend very much on a number of factors which a mere quotation of some *ipsissima verba* will certainly not make apparent. Much, too, must depend upon the standing of the court which delivered the judgment in question.

To take by no means the strongest instance in support of this view, the reader of this work may well be somewhat disconcerted by certain quotations from a judgment of the English Divisional Court in *Murray v. Parkes* (a case which was fully digested at p. 219 of the 1944 number of this *Year Book*), quotations which, taken out of their context, seem to express views with regard to the position and relationship of the constituent states of the British Commonwealth hardly in accord with the position as it is generally thought to be. Read in their context, however, and taking into account the real grounds of the decision, these quotations will neither seem to be so startling nor indeed very significant.

Professor Chen's general position with regard to the international law of recognition is stated by Professor Brierly in his Foreword.

Very briefly, the author starts from the position that international lawyers fall into two schools: (1) positivists, who regard the state as the ultimate source of international rights and duties; and (2) naturalists, who regard the state as being under a system of law which determines its rights and duties. If you are a positivist, then when we come to the problem of recognition it is possible, and perhaps natural, for you to take the constitutive position with regard to the recognition of states. If you are a naturalist, you will take up the declaratory position with regard to the recognition of states. The constitutive position with regard to recognition cannot (Professor Chen argues) logically be

consistent with the obligatory character of international law. These doctrinal questions are argued at the beginning of the book in a manner which is able and at times almost brilliant. The position of writers who take a different view is criticized, and an endeavour made to show that, unless they accept the full consequences of what Professor Chen considers to be the result of the constitutive view, they are illogical. Amongst other writers, Professor Lauterpacht is criticized as being illogical because Professor Lauterpacht is, in his general approach, more of a naturalist than a positivist, and is certainly an upholder of the obligatory character of international law and yet, in his book on Recognition, he adopted with qualifications the constitutive position. Nothing will be said here as to the justice or injustice of these criticisms because the reviewer believes that the whole question of the law of recognition has been bedevilled by the constituent and declaratory theories and thinks that the dropping of both of them would be an advantage, and that the doctrinal portion of Professor Lauterpacht's excellent book is also the least interesting and valuable portion of it. Another tendency which bedevils this question of recognition is the linking together, or the confusion between, the recognition of states and the Governments of states and the entry into or maintenance of diplomatic relations. No state is obliged to maintain diplomatic relations with another recognized state or its recognized Government, and the only connexion between the two things is that the maintenance of full diplomatic relations does, under the present law, imply recognition both of the state and of its Government. Professor Chen sometimes separates the two issues admirably and in other cases seems to run them together, perhaps because he treats very fully the practice and decisions in the United States and there has been in the United States a strong tendency to run these two things together, and as a result one now finds Professor Kelsen, who holds a Chair in the United States, trying to deal with the matter by distinguishing between two sorts of recognition, one of which he calls political and the other legal.

A third tendency which, in the reviewer's opinion, bedevils and complicates this question is the tendency to use the word 'recognition' alone and to fail to say 'recognition as (what)'. The reviewer ventured, in his review of Professor Lauterpacht's book, to address this complaint to Professor Lauterpacht, and he is obliged to repeat it as a complaint against Professor Chen. So many passages in the present work would become infinitely less complicated if, instead of saying: 'Act A did not amount to the recognition of X by Y' it were said: 'Act A did not amount to the recognition by Y of X as the *de jure* Government of State Z, but it did mean that Y recognized X as the *de facto* Government of part of the territory of State Z' (or whatever it may be). Almost any official act by one state in relation to an outside entity must mean that the state in whose name it is performed *recognizes that outside entity as something*, and if this is admitted and an inquiry is directed more particularly to the positive side (namely, that the entity is thereby shown to be recognized as K) rather than the negative side (that the entity is *not* shown thereby to be recognized as L), the inquiry assumes a less baffling aspect and states and governments do not then appear (as concentration on the negative side makes them appear) to be doing something and yet denying what would appear to be the natural deduction from their acts. In this connexion the reviewer was interested to find support in an unexpected quarter. In one of the recent volumes of Mr. Winston Churchill's work on the *History of the War*, Mr. Churchill, dealing with the question of the recognition of the French Provisional Government, observes that this question of recognition makes no sense to him unless accompanied by 'words of limitation' (i.e. saying *what* the entity is recognized (or not recognized) as being).

Lastly, there is in this sphere, particularly active as a source of confusion, the fact that legal terms are not used universally with the same meaning. This is particularly

true with regard to the question of 'recognition', which is so much used in the United States as the equivalent of 'entry into diplomatic relations' that a statement that the United States does not recognize X may well mean that it really does recognize X but is not prepared to enter into diplomatic relations with it.

Professor Chen's book goes over the whole field, being divided into seven parts: Recognition of States; Recognition of Governments; Legal Effects of Recognition; Modes of Recognition; Qualified Recognition; Recognition of Belligerency and Insurgency; and the Doctrine of Non-Recognition; these parts being subdivided into chapters so that there are altogether thirty-two chapters. Neither theory nor practice is neglected in any aspect. The material is very full.

With the author's main line of approach and with the bulk of the author's views in detail the reviewer finds himself in agreement, but in detail there are a fair number of comments with which the reviewer would disagree and one or two which seem to be almost perverse in their failure to see what appears to be the obvious and simple answer. But these latter cases are generally where the author becomes too much entangled with his doctrinal position.

One might be inclined to expect that an author who was expecting to go to the University of Peking might take up an extreme or biased position on the question of recognition of governments, but this is not so. In fact, in the whole book, on this topic as well as others the author is remarkably objective and impartial. Further, treating the topic of the 'doctrine of non-recognition' (i.e. of situations brought about by violations of international law), the author takes up a reasonable (middle) position.

No one can reconcile the practice of all governments in the field of recognition. Indeed, it is hardly possible to reconcile all the acts and pronouncements of any one single government. The balance of practice and authority can, as Professor Brierly states in his Foreword, be claimed as inclining in favour of the general position adopted by Professor Chen, and if international law is to make sense, it must broadly develop on those lines.

If, on the other hand, lawyers claim, as they have a right to claim, that those directing the political affairs of governments should, more consistently than they do, weigh seriously legal considerations in the field of recognition, lawyers must not be excessively critical of governments when in particular acute cases they depart from the line to which all legal considerations strongly point. If the present attitude of more than half the world of maintaining that the Chinese Nationalist Government is the *de jure* Government of China seems contrary to all law and common sense, it must be remembered that this attitude is in itself probably due to another defect in the law, namely, that the Charter of the United Nations does not provide that a state which the proper organ of the United Nations has found guilty of aggression should thereby automatically be suspended from the exercise of its voting rights in that Organization, and that the veto prevents this result being brought about by the article which specifically deals with suspension. If, again—to take another most controversial issue of the past, the Spanish Civil War—it appears that governments failed to follow the course which international law and practice indicated as proper (namely, to recognize the belligerency of both contesting parties), the non-intervention policy was adopted for serious political reasons, and this fact must be remembered even if, in the event, that policy really failed to achieve its purpose and only resulted in a whole series of legal complications.

Law and Society in the Relations of States. By P. E. CORBETT. New York: Harcourt, Bruce & Co. 1951. 337 pp. \$4.75.

The cover of this book states that it is 'a realistic examination of the facts underlying the concept of international law' and that it 'marks a radical departure from all previous thinking in this vitally important field'. While the learned author of this volume would probably be the first to dissociate himself from any exorbitant claims made on its behalf, there is no doubt that this book has intrinsic merits of its own and that it deserves a warm welcome. It covers, in unequal proportions, the law of peace, war, and neutrality. The clarity and the precision of its style, the happy choice of emphasis in the selection of topics, and its concentration on the modern developments make it an admirable introductory textbook for the student of international law. One of the reasons why the author has achieved this satisfactory result is that, notwithstanding the limited compass of the book, he has contrived to provide a stimulating and lucid discussion of some difficult theoretical problems such as the basis of international law, recognition of states, justiciability of international disputes, and so on. Because of the vigour and the freshness with which, despite its brevity, the author expounds the various topics of the book, this volume is of considerable interest to those outside the rank of beginners, and it is to be hoped that it will be widely and critically read.

The undoubted merits of the book are not seriously affected by the assumed façade of realism. Professor Corbett is not alone among writers on international law and relations who in the last quarter of a century have claimed to be realists. It is natural and tempting for authors to adorn themselves with that attribute. A writer who has established for himself a name as a 'realist' has gained at the same time a reputation for soundness and for that respect for facts which is the hall-mark of scientific method and of scholarship generally. But it is for that very reason that there may be some legitimate doubt as to the propriety of writers claiming for themselves and their argument the attribute of 'realism'. It is a claim which, by implication, suggests that others are not 'realists' in that sense; that they pay no attention to facts; and that they see things not as they are but as they ought to be. This is a suggestion which those others may regard as a reflection on their own scholarship. However, although Professor Corbett refers occasionally to his own realism, the fact is that that claim mars but little the robust common sense which pervades the book. That affectation of sobering realism expresses itself as a rule in the attempt to show that legal rules have played a smaller part in the relations of states than is generally assumed and that at times they have merely served the purpose of cloaking political pretensions in the respectable garb of legal rules. This, the learned author maintains, has been largely the case in the matter of the development of the law of the air (p. 156) and of 'quasi-legal window-dressing' with regard to claims to sovereignty over polar regions (p. 118). The author's realism also causes him occasionally to lean towards a somewhat conservative estimate of the possibilities of international organs. Thus he regards the programme adopted by the International Law Commission as amounting to no more than 'elaborating and refining abstract rules for the conduct of states' (p. 278). This he considers to be a 'harmless activity' provided that it does not deflect energies from the task of organizing the joint administration of common interests and provided also that 'it does not encourage the habit of regarding problems as disposed [of] by a species of quasi-legislation'. He would prefer the 'International Legal Commission' to transform itself into a body studying the fundamental conditions of 'the development of a world legal order'—though he suggests that this task may be more properly one for sociologists than for lawyers. The author's considered and balanced view on the essential identity of international law and international

organization is given weighty and fervent, though deliberately restrained and apparently inconclusive, expression in the final chapter entitled 'New Directions'—a chapter which, like Professor Corbett's book as a whole, will be read by many with much profit.

H. L.

International Law through the Cases. By L. C. GREEN. London: Stevens & Sons Ltd. Published under the auspices of the London Institute of World Affairs. 1951. xxviii+913 pp. £3. 15s.

This book contains some 170 cases illustrative of various rules and norms of international law, arranged in chapters under conventional subject-headings—'The Subjects of International Law', 'Recognition', &c. The earliest report is *Barbuit's case* (1737) and the most recent cases include extracts from the Advisory Opinions of the International Court of Justice regarding the *International Status of South-West Africa* and *Interpretation of the Peace Treaties* (1950). An analysis of the cases shows that about 76 were decided by British courts, including the Judicial Committee of the Privy Council, 41 by the Permanent Court of International Justice and the International Court of Justice, 20 by mixed claims commissions, arbitral tribunals, and the like, 10 by courts in the United States, 9 by the Permanent Court of Arbitration, and 4 by Canadian courts, while there are 4 or 5 war crimes cases. The captious may argue that most space is given to reports of English cases and those of the Hague Courts, to be found in almost any well-equipped library, which might well not contain American or Canadian reports of which the book gives comparatively few. Credit must, however, be given to Mr. Green for including in his book a number of awards of arbitrators and arbitral tribunals, which, as a class, apart from the three volumes of *Reports of International Arbitral Awards*, are not readily accessible. (In a future edition perhaps Mr. Green would assist the uninitiated who may wish to consult the original report of a case before the Permanent Court of Arbitration by explaining the significance of such a citation as '(1928) No. XIX'.)

The method adopted by the learned editor in presenting the cases is to give a brief résumé of the facts followed by extracts from the judgment or judgments. Some readers may be misled by the resemblance of the title of the book to Nathan's *Equity through the Cases* (Stevens), where the text of each case is preceded by a statement of the rule which it illustrates; is accompanied by explanatory and expansive notes and a comprehensive citation of authorities; and is followed by notes of other cases and authorities bearing on the rule. The original contribution of Mr. Green to his case book is limited to brief summaries of facts with footnotes referring, for the most part, only to citations of acts of parliament, treaties, and so on. For anything beyond this the reader is referred at the head of each chapter to the relevant page of the standard textbooks of Hyde, Oppenheim, and Schwarzenberger. Indeed, the arrangement of the book is stated in the Preface to be in accordance with Dr. Schwarzenberger's *Manual of International Law*.

At the same time, this book, which is well produced and of pleasing format, must be welcomed by those who have not in their library the earlier volumes of the *Annual Digest of Public International Law Cases*—now indeed virtually unobtainable—and who wish for ready reference to, for example, *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797. Mr. Green gives the judgments of Viscounts Cave and Finlay and Lord Sumner, compressed into 'nutshell' proportions by the ingenious use of little rows of dots to indicate excisions, followed by a note that 'Lord Dunedin

delivered a concurring judgment, while Lord Carson dissented'. On the other hand, this method of condensing two or three judgments selected from the five actually delivered in the House of Lords, tends to obscure the extent of the variation which so often exists in the *rationes decidendi* of the Law Lords, not least in cases involving international law. This defect—if defect it be—is notably exhibited in Mr. Green's treatment of three cases which occur close together in his book—the *Duff Development Company* case, just mentioned (p. 260), *Engelke v. Musmann* (p. 265), and *The Cristina* (p. 270). It tends, again, to reduce the contrast, in this respect, between the House of Lords' practice of plurality of judgments, and that of the Privy Council of rendering a single judgment—exemplified in this book, once more, by a group of cases: *Croft v. Dunphy* (p. 447), *In re Piracy Jure Gentium* (p. 449), and *Molvan v. The Attorney-General, Palestine* (p. 454).

A. B. LYONS

The International Law of the Sea. By HIGGINS and COLOMBOS. Second edition by C. JOHN COLOMBOS. London: Longmans Green & Co. 1951. xvi+678 pp. 50s.

The success which has attended this work is illustrated by the fact that, as is recorded in the Preface to this second edition, it has been translated into four foreign languages—French, Italian, Spanish, and German. There must be few modern works on international law which have had this distinction. Dr. Colombos has now revised the work and placed us farther in his debt. Incidentally, it is not to be forgotten that, since Dr. Colombos was almost entirely responsible for the original work, which appeared in 1943, the retention of the name of the late Alexander Pearce Higgins on the title-page is little more than a graceful gesture. Dr. Colombos has had entire charge of the considerable research and writing involved ever since 1930.

The new edition is only thirty pages longer than the old. Nevertheless, there is a considerable bulk of new material. Thus there have been added passages on the legal status of the bed and subsoil of the sea (pp. 54–58), the present position of the Danube (pp. 161–2), the establishment of I.M.C.O. (pp. 295–8), and the Treaties of Rio and Brussels and the North Atlantic Treaty (pp. 652–4), as well as much valuable information concerning developments during the latter part of the Second World War, which has been woven into the chapters on the laws of war. The references to periodical literature—for which Dr. Colombos has apparently had only a general responsibility—are possibly not as complete as they might be. But the volume contains such a wealth of references that it is difficult to criticize it on this ground. It may not contain every work on the subject; but it is a model of industry and exactness.

C. P.

Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge. Zugleich ein Beitrag zur Lehre von der Staatensukzession. By HANSJÖRG JELLINEK. Max Planck-Institut für Völkerrecht, &c., Heidelberg. Berlin: Carl Heymanns Verlag. 1951. xxiv+253 pp.

Amongst the principles or rules concerning nationality which are propounded from time to time as being principles or rules of international law that which has the best claim to stand second to the principle adverted to in the *Tunis and Morocco Nationality Decrees* case—the rule that State A cannot decide who is, or who is not, a national of State B—is the principle that where there is a change of territorial sovereignty the

nationality of persons domiciled in the territory affected is ordinarily changed automatically. Where there is a total or partial state succession, it is said, the nationality of individuals is or may be changed as a result of the direct operation of rules of international law. All or most other aspects of nationality law may be strictly municipal in character. But in this instance it is international law which applies. The thesis is not, however, by any means universally accepted. And, even if theoretical objections based on a dualistic conception of international law are discounted or met, the content of the pretended rule is not incapable of dispute. And more or less exact approximations to it in treaties can be cited as evidence of its exceptional, as much as of its general, operation. In an excellently documented study Dr. Jellinek sets out to explore this terrain.

In the first, or historical, part of his work he concludes that up to the First World War state succession did as a rule produce an automatic change of nationality but that the increasing use in treaties of option clauses was tending to ameliorate the condition of inhabitants of territorial areas affected and to give them some individual choice in the matter; that developments between the wars tended farther in the same direction; but that the customary rule of automatic change of nationality has on the whole retained its place as the general rule. And he finds that this conclusion is borne out as much by the opinions of writers as by the practice of states.

The learned author then passes to a separate examination of the various cases in which the problem can arise. He thus deals with state succession under treaty and the like, under which head he considers principally cession, judicial award of territory, exchanges of populations, and the German *Umsiedlungsverträge*, whereunder the Germanic racial groups in the Baltic States were brought 'home' to Germany. Incidentally, he gives to these last the arresting and constructive, but perhaps slightly misleading, description of 'annexation treaties *sui generis*'. Next he deals with state succession otherwise than by contract or quasi-contract. Under this head he distinguishes for the purpose of exposition between the case where a new state is set up and the case where the territory of an existing state is wholly absorbed by one or more other existing states. Finally, he discusses the effect upon nationality of the creation of international leases, the régime of a mandate or trust territory, and federations and confederations in their various forms, and also the effect of belligerent or other occupation of territory.

There is a great deal of very interesting material in the book respecting the effect upon nationality of the territorial expansion of Germany and Italy before and during the Second World War. The conquest of Ethiopia, the partition of Poland of 1939, the German protectorate of Bohemia and Moravia, the absorption of the Baltic States, and the 'Personal Union' between Italy and Albania are thus all touched on. And the whole discussion is valuable. But Dr. Jellinek's conclusions tend to be of too general a nature to achieve a full measure of usefulness.

CLIVE PARRY

Voting and the Handling of Disputes in the Security Council. By EDUARDO JIMÉNEZ DE ARÉCHAGA. New York: Carnegie Endowment for International Peace, United Nations Studies No. 5. 1950. 189 pp.

The literature of Article 27 of the Charter is already large. It suffices to mention in this connexion the lengthy section in the book by Mr. Wellington Koo, Jun., entitled *Voting Procedures in International Political Organizations*, which concerns the Security Council, and Dr. Yuen-Li Liang's article in this *Year Book*, 24 (1947), on 'The Settlement of Disputes in the Security Council: the Yalta Voting Formula'. The volume under review constitutes an addition by a former member of the Department for Security Council

Affairs of the Secretariat, a branch of the Secretariat which has already contributed materially to the history and health of international organization by the working out of a technique for the co-operation of permanent and representative organs of organizations. The Department is well on the way to the production—in collaboration, paradoxically enough, not with the Security Council but with subordinate organs of the Little Assembly—of something in the nature of a manual of peaceful settlement. The need for such a guide is surely obvious. When conciliation and the like were the prerogative exclusively of foreign ministries of individual states there was a presumption, arising principally from the active interest and concern in a particular dispute of the intervening state, that the latter knew how to go about matters. There is, however, no necessary implication for the indivisibility of peace that organs or delegates of an international organization are equipped by experience to apply in any particular case the most appropriate means of settlement. The infinite methods of peaceful settlement—conciliation, mediation, good offices, and the like—lack even definitions. The manifestations of agreement may be as various as the aspects of sovereignty. A first step towards the better ordering of matters must be the assembling of precedents, an immense task with which the Department has already made a most promising start. There is room, however, for individual effort in this direction.

If, therefore, this book is opened in the expectation that it will throw new light on Article 27 and that expectation is to some extent disappointed, the reader must not be discontented. Dr. de Aréchaga indeed brings us no such revelations of the conclaves of the Sponsoring Powers as did Drs. Koo and Liang. His book is in fact somewhat inappropriately named. Only the first chapter deals specifically with voting procedure, though, of course, there is elsewhere constant reference to voting. And the conclusions of this chapter will not command universal assent. For the learned author is in favour neither of the view that the Joint Statement constitutes an authoritative interpretation of Article 27 nor of the 'chain of events' theory therein expressed. However, the main value of his work lies not so much in the analysis contained in this chapter as in the remaining chapters. In these he relates and discusses the action taken by the Security Council with respect to the initial submission to and preliminary discussion by that body of disputes or situations; the application of Article 34; resolutions and recommendations for pacific settlement; measures for the averting or ending of hostilities; and action under Chapter VII. The arrangement is systematic rather than exhaustive. Dr. de Aréchaga does not, any more than did the State Department in its *United States Policy in the Korean Crisis* with respect to the limited question of abstentions, attempt to set out every precedent the Security Council has set for itself. Thus (at pp. 48-49) he says that Article 99 has not so far been invoked and, when discussing the Korean question, he does not say specifically how this reached the Security Council. The latest Annual Report of the Secretary-General, however, implies that it entered there under Article 99. And this is not the only instance of action in the spirit of that article. Nevertheless, the whole makes a very valuable handbook of Security Council practice.

C. P.

Recent Trends in the Law of the United Nations. By HANS Kelsen. London: Stevens & Sons Ltd. The Library of World Affairs. 1951. 86 pp. 10s. 6d.

In this little book, the pagination of which is continuous with that of his *Law of the United Nations* so that it runs from p. 909 to p. 994, Professor Kelsen carries farther his analysis of the Charter and of the practice of the United Nations according

to what may be called principles of self-consistency. Here he deals with four matters: the compatibility or otherwise of the North Atlantic Treaty with the Charter; the action of the United Nations with reference to Korea; the extension of the Secretary-General's term of office; and the so-called Acheson Plan. In his Introduction the learned author so far acknowledges the various criticisms of the limitations of his method which have been advanced as to say that he is, of course, aware 'that the law of a community . . . may be changed not only by formal amendments carried out in accordance with the procedure laid down for this purpose in the law itself', so that constitutionality in terms of the letter of the Charter itself is not the only test of the desirability or undesirability of the developments of practice. Perhaps the change of heart goes farther than this. For one finds Professor Kelsen justifying the North Atlantic Treaty both on the ground that Article 51 gives the Security Council no supervisory jurisdiction over merely preparatory measures of collective security (pp. 915-16) and because it 'fulfils all the requirements of a regional arrangement' (p. 920). Similarly, he says that 'it is not excluded to argue' that the resolutions of the Security Council anent Korea were not unconstitutional so long as the credentials of the representative of the former Government of China continued to be accepted (p. 944). The extension of Mr. Lie's term of office by the General Assembly acting alone would appear to disturb him more (pp. 950-2), but, uncharacteristically, he refrains from any direct condemnation of that step. He finds, indeed, many inconsistencies with the Charter in the Acheson Plan but seems content to describe 'This relapse to a state of a more decentralized system of collective security within which no veto right of privileged Members prevails . . . [as] . . . not anticipated by the framers of the Charter . . .' (p. 986). And he says generally that 'If and in so far as the organization of collective self-defence through the North Atlantic Treaty, the action in Korea, the re-appointment of the Secretary-General, and the resolution "Uniting for Peace" are inconsistent with the old law of the United Nations, they, perhaps, constitute one of these cases where we may say *ex injuria jus oritur*' (p. 912). It will be interesting to see what will be the next step in the development of Professor Kelsen's thought in the matter.

CLIVE PARRY

Materialy k istorii organizatsii Obyedinennykh Natsii (Materials on the History of the Organization of the United Nations). By S. B. KRYLOV. Volume I. Academy of Sciences of the U.S.S.R.: Institute of Law. Moscow-Leningrad. 1949. 344 pp.

This is the first volume of a study in Russian of the United Nations, and is devoted entirely to the history and drafting of the Charter. With the exception of one or two articles in the Soviet legal periodicals, it is the first study on this subject to be published in Russian. The author, Professor S. B. Krylov, is singularly well qualified for the task. At present a judge of the International Court of Justice, he was one of the Soviet delegates at Dumbarton Oaks and at San Francisco, and took an active part in the preparatory work which led to the drafting and signature of the Charter.

It is a melancholy fact that no Soviet scholar can, in the conditions in which he works in Soviet Russia, produce a book which is not openly political in its aims. Indeed, the very word 'objective' is currently used in reviews and discussions in Soviet academic legal circles as one of the most serious charges which can be levelled against the author of a legal work. Professor Krylov makes no secret of his political intentions. The object of his study is to show, in the first volume, that the Soviet Union actively supported the principles which were embodied in the Charter when it was drafted, and was fully

prepared to support these principles thereafter. However, 'the imperialist camp, headed by the United States', he writes in his preface, 'hypocritically taking cover behind allegations of international co-operation, but in reality striving to subordinate the United Nations to its imperialist interests, is retreating before our eyes from the principles laid down in the United Nations' Charter and by this means undermining the very foundations of the Organization'. In his next volume he promises to demonstrate this imperialist conspiracy and to contrast it with the democratic aims of the Soviet Union within the United Nations.

Meanwhile he is concerned with the history of the drafting of the Charter. There is no shortage of material on this. The average daily output of documents at the San Francisco Conference (according to Professor Clyde Eagleton) was half a million sheets, and seventy-eight tons of paper were used. It is of interest to see how Professor Krylov deals with this vast documentation in a comparatively small compass. A short introduction on the Atlantic Charter and the Moscow Conference is followed by a section of some thirty pages on the Dumbarton Oaks Conference. The remainder of the text is devoted to the labours at San Francisco. After dealing with the composition and with the opening of the Conference and the general procedural decisions, he deals in order with the work of each of the four principal committees and of the Steering Committee. This necessarily means a somewhat dry and enumerative method of treatment and one which involves certain subjects, of which the treatment in committee overlapped, being dealt with more than once in the course of the narrative. The account ends with a short chapter of conclusions on the significance of the Charter for the development of international law. This last chapter, which could have been the most interesting part of the book, is in fact little more than the familiar Soviet propaganda line on the question, reinforced by liberal quotations from Stalin and Molotov. An Appendix reprints the Russian texts of the Dumbarton Oaks proposals, the amendments proposed by the four sponsoring powers, and the Charter, in parallel columns.

Professor Krylov has carefully avoided any personal contribution based on his own recollections, but has confined himself to the published documents. No light is thrown, for example, on the nature of the draft produced by the Russian delegation at the Dumbarton Oaks Conference. The only clue to this remains, as hitherto, a long article published in Russia at the time over the signature of Malinin (summarized by Professor Krylov). The prominent reference to Malinin's views lends support to the impression generally prevalent at the time that this article embodied the official Russian proposals. Since Professor Krylov's own political bias is in no way concealed—all Soviet proposals at San Francisco were dictated in the interests of peace and democracy, all British and American proposals in the interests of imperialist domination—this book must be assessed by the extent to which it fairly summarizes facts. On the whole, this task has been fairly achieved. But there are some exceptions. To take one example, it is scarcely accurate to say that the United Nations is entitled to subject candidatures of new members to a political appraisal, over and above the conditions laid down in Article 4 of the Charter, and to cite the International Court's Advisory Opinion of 28 May 1948 'and especially the minority opinion' in support, without pointing out that the majority took the exactly opposite view. Professor Krylov rarely expresses his own views on the construction of legal problems raised by the Charter, and the few occasions where he departs from this rule are not of outstanding interest. He refuses to recognize either the United Nations or the Specialized Agencies as subjects of international law. They are in law no more than 'the organs of the governments which they represent'. He also vigorously opposes the view that the individual should become a subject of international law. 'To admit such a quality for individuals

would facilitate the possibility for the large imperialist powers of intervening in the internal affairs of other, weaker states with the alleged purpose of defending the rights of individuals.'

These two opinions sum up the wide gulf which separates the Soviet view of international law from the view of those in the West, who, in line with the Grotian tradition, are anxious to see the development of international law along more progressive lines than the Charter of the United Nations contemplates. No rule of law is possible unless international organization is allowed to acquire a legal authority which is superior in force to the wills of the members who compose it. (Incidentally, Professor Krylov skirts somewhat casuistically the totalitarian nature of the Security Council which, if the Great Powers should ever happen to agree, could enforce its will on a small Power in a way which the League Council could not.) No effective protection of the individual is possible, where the individual is denied the right to set in motion himself the system devised for his protection. It is now becoming recognized that the legal order created by the United Nations Charter was in many respects a retrograde order. It was agreed to by the Western Great Powers. This was partly due, no doubt, to the desire to secure Russian co-operation on the only terms which Russia would accept. But a reading of the debates at San Francisco leaves one with the uncomfortable feeling that the retrograde insistence on such questions as safeguarding sovereignty or domestic jurisdiction was not only on the Russian side.

Professor Krylov's book is designed to provide Russian delegates at the United Nations with the raw material to serve as a reminder of what was agreed on in June 1945. It will be used to oppose steadfastly any second thoughts in a more progressive direction on the part of the countries of the West.

L. B. SCHAPIRO

Vers un nouveau droit international de la mer. By NICOLAS MATEESCO. Paris: Editions A. Pedone. 153 pp.

This book is written as a sequel to the author's *Le Droit international nouveau*, which was published in 1948 and was a work concerned with the general problem of keeping international law in line with social and economic changes. A separate book on air law is promised by the author at a later date.

After giving a brief, but competent, summary of the development of the international law of the sea, M. Mateesco poses the essential problem. This is, he says, that, quite apart from minor difficulties such as the extent of the territorial sea or the nature of the rights that may be exercised in a contiguous zone, the conception of the freedom of the seas is no longer in accord with modern needs. That conception rested on the assumption that states were physically incapable of 'occupying' more than a very small belt of territorial sea and that the high seas were properly *res communis*, open to exploitation by all; whereas, today, powerful states are in fact capable of occupying large areas of sea and the unrestricted exploitation of the resources of the high seas by all and sundry would soon lead to the exhaustion of these resources. M. Mateesco finds the solution to this problem in the increased knowledge of the nature of the sea-bed and in the greatly enhanced possibilities of its exploitation which modern science has made available. Whereas, previously, the sea was divided somewhat arbitrarily into territorial sea, contiguous zone, and high seas, the line of demarcation (whatever its precise length) being always one based on distance from the shore, today it is not only possible, but also more logical, to allow the coastal state to exercise sovereignty over the whole of its continental shelf. By continental shelf M. Mateesco understands not only the sea-bed

and subsoil but also the superjacent waters as well. This solution involves the substitution of a criterion based on depth (e.g. 200 metres) for one based on distance (e.g. 3 miles). Where the continental shelf does not exist, M. Mateesco admits that the coastal state should still be allowed to exercise sovereignty up to a certain minimum distance. For this he would allow 18–20 miles rather than the present 3-mile limit, but he considers the claims of some states to 200 miles to be grossly exaggerated in present circumstances.

There is a superficial simplicity about these ideas which may be attractive. M. Mateesco argues that, if his solution is adopted, arid controversies about the breadth of the maritime belt, the nature of the contiguous zone, and so on will become superfluous. This, however, is a wholly unrealistic view. Apart from the difficulty of delimiting the territorial sea in cases where there is no continental shelf, the problem of defining the exact extent of the sovereignty which the coastal state would be entitled to exercise over its continental shelf would raise precisely the same issues that bedevil the law of the sea at present. For M. Mateesco admits that, in regard to navigation and fishing, the sovereignty of the coastal state could not, in the interests of the international community, be unconditional.

M. Mateesco envisages the possibility of extending the sovereignty of the coastal state even farther in future, as well as a general trend whereby the law of the sea would lose its special character, becoming more closely assimilated in the process to the law of the land. He also suggests that there is need to call an international conference to discuss the question of the territorial sea and the continental shelf and that there should even be an international maritime court with special jurisdiction in these matters. In default of such an international conference, he thinks that the customary law of the sea is already undergoing a change through the agency of recent unilateral proclamations by various states. (These proclamations are competently summarized in the book.) M. Mateesco overlooks, however, that many of these claims are purely 'paper claims' and that, if there seems to have been a measure of acquiescence in some of them, that is probably because the interests of other states have not yet been directly affected. The current tensions between a number of states with regard to matters arising out of the law of the sea give no indication either that any new, clearly defined custom is in process of formation or that a new conference would be any more successful than the one which failed in 1930. There is no value in proposing changes which do not take account of the interests of the principal states involved, even though the adoption of these changes would cause the law to assume a more logical appearance. M. Mateesco claims to be outlining a new law of the sea; but the consequence of looking at the problem, as he does, almost exclusively from the point of view of individual coastal states, rather than from that of an interdependent international community, vitally interested in freedom of communication between states, is to produce a law which is in many respects reactionary rather than progressive.

D. H. N. JOHNSON

Cases on Private International Law. By J. H. C. MORRIS. Second edition. Oxford: Clarendon Press. 1951. xxvii+417 pp. 30s.

The publication of the second edition of this case book satisfies a long-felt need. Any comparison with the first edition reveals the extent to which the English rules of the conflict of laws have been developed and clarified in the last few years. There is hardly a section which does not report—or cite in the doctrinal notes—decisions given in the last ten years. It is sufficient to refer to the clarification of the law relating to nullity

of marriage in *De Reneville v. De Reneville*, decided in 1948, and the modification of the supposedly rigid rules relating to polygamous marriages in *Srini Vasan v. Srini Vasan* and *Baindail v. Baindail*, decided in 1946. Nor has this process of development ended. The subject of polygamous marriages, for instance, has already seen new developments in the decision of Barnard J. in *Risk v. Risk*, [1951] P. 50.

It would be invidious to criticize the choice of cases. To some extent any such choice is a matter of personal approach. The selection in this case may also have been influenced by the fact that the book is intended to be used in conjunction with Cheshire's *Private International Law*. Only one section would seem to be seriously inadequate, namely, that relating to bankruptcy, and this omission is in harmony with the general policy of excluding the subject of bankruptcy from the student's syllabus of the conflict of laws. On the other hand, one general consideration suggests itself in this connexion. Should a case book concentrate on reporting the leading cases which have given the law its actual form and content, or should it go out of its way to present to the student—for whom it is principally intended—controversial decisions, and judgments which point the way to possible future developments of the law? One recent decision which might be included by reference to the latter principle is the judgment of Denning L.J. in *Kenward v. Kenward*, [1951] P. 124, relating to the frustration of a marriage between parties who are domiciled in different countries. Another—and one that is to some extent complementary to the decision in *Boissevain v. Weil*, which is reported in Mr. Morris's book—is the decision of the House of Lords in *Frankman v. Anglo-Prague Credit Bank*, [1950] A.C. 57. While that case was mainly concerned with the question of the proper law of the contract, the interest of the decision lies also in the fact that a foreign revenue law was applied—contrary to the usual principles of public policy—by reference to the wider requirements of international co-operation and the observance of international co-operation and international treaties.

The decision not to print judgments in full, but to report only those portions which deal directly with private international law and to utilize the space thus made available for the inclusion of a greater number of cases, would seem to have been a wise one. A similar policy is followed in most case books, and also, in a slightly different sphere, by the *Annual Digest and Reports of Public International Law Cases*. A great deal depends, naturally, on the manner in which such extracts are made. Little exception can be taken to the method of selection in this case. Thus considerable space is devoted to the judgment of Lord Greene in *De Reneville v. De Reneville*, the importance of which lies in the presentation as much as in the conclusion reached.

This book will be of great value for the student. It contains, in a convenient form, the leading decisions on the subject up to 1950. Moreover, the doctrinal notes are models of lucidity and compression. Not only will the volume be of use in conjunction with textbooks on private international law: it provides in its own pages a valuable introduction to the subject.

F. M.

A Concise History of the Law of Nations. By ARTHUR NUSSBAUM. New York: The Macmillan Company. 1950. xi+361 pp. \$4.50.

In the Introduction to this book Professor Nussbaum anticipates the nature of the criticism which might be levelled against it. Such doubts as there may be will be of his selection of topics rather than of the skill with which he has dealt with them. To quote the author's words: 'The history of the law of nations as here conceived encompasses

political events as well as doctrines. . . . A vexing problem of method springs from the bearing of political history upon the law of nations. Obviously, almost any phase of political history can be related to international law in one way or another. How to chart the boundary line? This line, it is believed, has been too far pushed into the province of political history.' It is possible that in redressing this demarcation Professor Nussbaum has strayed too much into the analysis of doctrine.

The first and second chapters, which deal with Antiquity and the Middle Ages, are not, however, open to criticism on this count. In describing the earliest treaties and exchanges of ambassadors, the author is careful to emphasize that these are not referred to as being part of the history of contemporary international law but merely because they illustrate the need for the legal regulation, even in earliest times, of the relations of independent communities. In these chapters treaties, war, ambassadors, and maritime custom each find their place as forerunners of the main constituent parts of the modern system of the law of nations.

The chapters which follow are, in accordance with the views expressed in the Introduction, prefaced by a section describing the main political and doctrinal developments of the century. The remainder of the chapter on the sixteenth century is occupied by an analysis of the contribution to international law of Victoria, Suarez, Belli, Ayala, and Gentili. This procedure of viewing the development of international law as determined by the contributions of writers is followed to the end of the chapter dealing with the eighteenth century. The method has its merits. Holdsworth's *Some Makers of English Law* is probably the outstanding example of this approach. It has the danger, however, of over-emphasizing the position of the writers at the expense of developments in the rules themselves. However that may be, Professor Nussbaum has extracted with admirable skill the salient details of the writings of Grotius, Pufendorf, Bynkershoek, and their eighteenth-century successors.

The declining influence of writers and the increase in state practice in the nineteenth and twentieth centuries is reflected by the abandonment in the relevant chapters of the treatment of individual writers. Instead there appear full accounts of the development of treaties, of the rules of warfare, of the movements for the humanization of war, and the earliest suggestions of international organization. These are followed by accounts of doctrinal and literary developments and of the history of the movement for the pacific settlement of disputes both judicially and politically. These are, in many ways, the most satisfactory chapters of the book.

The question remains whether, despite its intrinsic interest and the clarity of its exposition, this work satisfactorily meets the prevailing need for a history of international law suitable for use as an introduction to the subject. Professor Nussbaum's book will no doubt find its place on every student's reading list as a convenient introduction, especially to the works of the principal writers of authority. Used in conjunction with Butler and Maccoby's *The Development of International Law*, it makes a useful contribution to the teaching of the subject. Admittedly, even these two books are not in themselves sufficient. They must be supplemented by articles and introductory chapters of specialized works such as the Classics editions of the Carnegie Endowment for International Peace. In so far as any single volume can provide an adequate historical introduction to international law, Professor Nussbaum's work must now surely be among those which can be confidently recommended.

E. LAUTERPACHT

Money in the Law—National and International. A Comparative Study in the Borderline of Law and Economics. By ARTHUR NUSSBAUM. Brooklyn: The Foundation Press, Inc. 1950. xxxii+618 pp. \$8.00.

This completely revised and substantially expanded edition of Professor Nussbaum's earlier *Money in the Law*, which was first published in 1939, is a work of great value to all who study, teach, and practice in almost any branch of the law. Money touches upon the law at many points, and the author has performed a remarkable feat of learning and condensation in collecting together the authorities relating to so many of them. The range extends from such matters as the correct currency in which to express a claim for damages in the International Court of Justice to the question of classifying, for the purposes of German law, monetary questions as problems of public or private law. Professor Nussbaum has, moreover, been at pains not to avoid an examination of the economic factors which affect the solution of monetary problems.

The first part of the work, under the heads of Specific Money and Debts, is devoted to an examination of the law of money in general. In discussing the concept of money Professor Nussbaum adheres to the societary theory, that is to say, he maintains that the attitude of society, as distinguished from that of the state, is paramount. This opinion is accepted neither by the English courts (which have recently reasserted their point of view in *Bonython v. Commonwealth of Australia*, [1951] A.C. 201), nor by Dr. Mann in his article 'On the Meaning of the "Pound" in Contracts', *Law Quarterly Review*, 68 (1952), p. 195. There follows an analysis of the problems and types of specific money—an analysis which pays particular attention to the extent to which bank deposits may be treated as money. The problem of classification which arises in attempting to distinguish between money and documents which pass as money is one which might well become of greater urgency if the practice of using 'tokens' for the purchase of such commodities as books, wine, and records were to increase. The municipal law aspect of debts receives very full treatment, even down to minutiae such as the power of the English courts to award and determine the rate of interest. Professor Nussbaum does not, however, express an opinion on the vexed question of the power of an arbitrator to award damages—a question which has since been resolved by the decision of the English Court of Appeal in *Chandris v. Isbrandtsen-Moller Co. Inc.*, [1951] 1 K.B. 240. Probably he does not support with sufficient reference, at least to English authority, the proposition (at p. 159) that 'where interest is granted because of "mora" or a breach of contract on the part of the money debtor, Anglo-American . . . law considers it the full measure of damages'. The remaining portion of the section on debts consists principally of a very full and useful analysis of the operation of gold clauses.

The principal interest of the book for international lawyers—both public and private—will lie in the second part, devoted to the effect on monetary problems of foreign elements. The problems which the private international lawyer would expect to find dealt with—the rate of exchange and gold clauses internationally—are treated most fully, with copious references to judicial decisions and legislative enactments of the principal European and American states. These sections are followed by a survey of the development and problems of exchange control. The assertion (at p. 475) that 'public international law is no bar to exchange restrictions' may require some qualification.

The section on Warfare and Military Occupation will be of particular assistance to those who are concerned with the practical problems which are still arising from, for example, the issue of occupation currency by belligerent occupants of enemy territory. But he makes no reference, other than to the provisions of the Armistice of 1943, to the

solution of this problem in the Peace Treaties which have been concluded since the Second World War (see Fitzmaurice, 'The Juridical Clauses of the Peace Treaties', *Hague Recueil*, 73 (1948), p. 342). The omission from the paragraph on Wartime Law of Money in General of any reference to the two principal English cases on the effect of war on debts, namely, *Wolff v. Oxholm* (1817), 6 M.D.S. 92 and *Re Fried. Krupp*, [1917] 2 Ch. 188, makes the treatment of that topic somewhat incomplete, as does the failure to mention the terms of the Treaties of Peace with Italy, Roumania, Bulgaria, Hungary, and Finland which provide that neither the war nor anything in the Treaties shall affect the right of parties to debts created before the war (see Fitzmaurice, loc. cit., p. 344). This part of the work concludes with a critical analysis of the structure and operation of the International Monetary Fund. As an annex the author adds a most interesting examination of the legal history of American currency.

An apparent defect of this treatise is that the mass of detail into which Professor Nussbaum enters on occasions makes difficult the extraction of principles. The fault—if it is a fault—is partly the result of the author's method. The book is described as an exercise as much in comparative law as in international and municipal law. In order to do justice to this description and in the attempt to cite on any controversial point authorities not merely from one but from several states, Professor Nussbaum occasionally overlooks the necessity for relating these various authorities to any clear statement of principle. However, no reader expects to find any book on money an easy book to use. Professor Nussbaum's treatise is an outstanding and, in these days, all too rare example of the application of the comparative method by a scholar of distinction who has more than a superficial acquaintance with several systems of law.

E. LAUTERPACHT

Power Politics. A Study of International Society. By G. SCHWARZENBERGER. Second revised edition. London: Stevens & Sons Ltd. 1951. 898 pp. £3. 10s.

The first edition of this book appeared in 1941. In the present revised edition the author has done more than bring the volume up to date. He has rewritten it and more than doubled its size. The book now constitutes a treatise on international relations and must be regarded as a distinct contribution to the subject. In so far as it directly touches upon questions of international law—and it does so continuously in all matters pertaining to international organization—it is of considerable interest for students of international law as well. It is based on very wide reading and is characterized throughout by an independence of approach and a courage of criticism which does not shrink from outright and occasionally bitter denunciation of the policies and fundamental attitudes of sovereign states. It is possible that that vigour of exposition and discussion impairs occasionally the effects of—to use the terminology of the author—the evangelist purpose of this treatise. However, that feature of the book does not, in the opinion of the reviewer, decisively affect its value as a full and stimulating exposition of the central facts and problems of international relations and their impact upon international law. Although the book has a pronounced tendency—it is clearly written *cum ira et studio*—it is almost invariably a progressive and idealistic tendency. The guidance of the teacher and the reader's own common sense may be relied upon to correct any excesses of Dr. Schwarzenberger's emphatic style.

The treatise is, of course, more than an introduction. It is a systematic presentation of the entire field of international relations and that part of international law which is related to international organization. Thus, for instance, the second—the main—part

of the book, covering nearly five hundred pages and entitled 'Power Politics in Disguise', is largely a commentary upon and a comparison of the Covenant of the League of Nations and the Charter of the United Nations with regard to such matters as pacific settlement of disputes, collective security, international regulation of armaments, international co-operation within the United Nations, international protection of human rights, and trusteeship. This being so, neither the title of the book as a whole nor the titles of its subdivisions—often somewhat artificially strained in order to bring them within the orbit of the major notion of 'Power Politics'—do justice to the learning and purpose of the author, the merits of the treatise, and the prodigious effort expended upon it. Probably the book would be even more valuable if the author were to call it what it is in fact, namely, 'A Treatise on the Theory and Practice of International Relations', and if its substance and method were to make some concession to the requirement of restraint in scientific discussion and exposition.

H. LAUTERPACHT

The Secretary-General of the United Nations. His Political Powers and Practice. By STEPHEN M. SCHWEBEL. Harvard University Press. 1952. xii+299 pp. \$4.75.

The reader could be forgiven for opening this book with some trepidation. For at first sight the theme seems to present the author with the unpromising alternatives of uninformativeness and of indiscretion. Mr. Schwebel, however, has triumphantly steered between the Scylla of the trite and the Charybdis of the injudicious and is much to be congratulated on his performance. He has produced a valuable and interesting book, full of highly original material, by means of methods of research which have called for great persistence and self-reliance.

The nature and success of his achievement can only be appreciated if it is realized that this is an experiment in biography: in the biography of the office of Secretary-General in the two world political organizations, the League and the United Nations. Its preparation has involved the cross-examination *vis-à-vis* of the late Lord Perth, of M. Avenol, and of Mr. Trygve Lie, as well as of many other persons whose official duties placed or place them near to these central figures. The list of witnesses, which occupies two pages in the Preface, is an impressive one, and testifies as much to Mr. Schwebel's pertinacity and skill in handling people as to the willingness of past and present international civil servants to assist him in his novel task. Great confidence has clearly been placed in him. But it is clear that he has more than justified the time and the trust involved.

The book opens with an explanation in the Preface of its 'unorthodox usage of the term "Secretary-General"', which embraces 'the occupant of the office, his Executive Assistant, and the ranking members of the Executive Office, as well as the Assistant Secretaries-General, the General Counsel, and certain miscellaneous officers of the Secretariat who carry out political assignments at the Secretary-General's personal or quasi-personal instructions. . .'. For 'It is the Secretary-General who is at once in Geneva and New York, who simultaneously lunches with the Secretary of State and sifts data on tribal autonomy in Togoland, who is legal adviser to the Security Council and the prolific author of a vast number of economic and social studies. . . Little is done in the Secretariat's name; virtually nothing in the name of any member of the Secretariat other than the Secretary-General. . . The term as officially employed by the United Nations embraces the totality of the activity of the Secretariat of the Organization.' That is not to say, however, that there is nothing here about Mr. Lie

himself or his personal quasi-predecessors, the two Secretaries-General of the League; nor that this is a wholly comprehensive account of the International Secretariat. Indeed, readers will turn with interest to the Appendix on the resignation of M. Avenol, wherein Mr. Schwebel, who deals with the incident in an admirably restrained manner, prints a great deal of original material. And the sub-title to the book is not to be forgotten: it purports only to deal with the political functions of the Secretary-General.

The book falls into three parts. The first, which is preceded by an introduction devoted to the League in which, incidentally, Mr. Schwebel to some extent discounts the popular delusion that Sir Eric Drummond's rule was an entirely negative one, deals with the framing of the provisions of the Charter governing his office and the appointment of Mr. Lie. The conclusion here is the expected one that the framers of the Charter expected much of the office but that the First Assembly found it possible only to fill it by compromise. In the second part the exercise and development of the express and implied powers of the office by the designated holder thereof are exhaustively treated. The Secretary-General's relations with the General Assembly and the Security Council, with the non-political organs of the United Nations, with governments, and with public opinion are taken separately for this purpose. It is, of course, possible to disagree with the author's analyses and conclusions with respect to these matters, but it is impossible to deny the breadth and balance of his view. In the third part, the future of the Secretaryship-General, there is even more room for disagreement. But here Mr. Schwebel is even more cautious than usual in the expression of his own opinions. He quotes, but does not endorse, the view of Mr. Phelan, who charmed us years ago with a not dissimilar account of the official life of his chief and—may it be said?—his hero, Albert Thomas, whom Mr. Schwebel characterizes as the 'vivid archetype' of the Secretary-General of the United Nations. Mr. Phelan says: 'What is needed is leadership by the Secretary-General—leadership which is public and manifest.' Mr. Schwebel says merely: 'The Secretary-General . . . cannot expect to exercise full powers of policy proposal in the near future. It is a question of slow growth. But this is surely the direction of the growth.' This seems an excellent conclusion to a singularly judicious study.

It must be added that the last sixty pages of the book are devoted to notes to the several chapters and to a bibliography, which bear ample witness to the laboriousness of Mr. Schwebel's researches.

CLIVE PARRY

Traité de droit international public. By MARCEL SIBERT. 2 vols. 1951. Vol. I, 992 pp.; Vol. II, 812 pp. Paris: Librairie Dalloz.

This encyclopaedic exposition of the law of peace is in the great tradition of important treatises, in the French language, of public international law. The learned author must be warmly congratulated on an achievement consummating many years of devoted labour. Although the wealth of information and the richness of the bibliographies in these two volumes create the impression, at first glance, that the treatise is in the nature of a compilation, closer acquaintance with their contents does not substantiate that impression. The treatise, which covers the entire law of peace and the settlement of international disputes, abounds in critical judgment, accentuated on occasions by exclamation marks, and helpful suggestions *de lege ferenda*. The author apparently commenced his work on the treatise at the time when the League of Nations was still in existence and this fact accounts to some extent for the circumstance that the League and its institutions and problems are treated at what according to some may seem

excessive length. The reviewer is not prepared to agree with this view. Any exposition of the law of the United Nations, especially in the initial stages of its activity, gains in clarity and usefulness by a comparison with the experience of the League of Nations.

While, naturally, French law and jurisprudence and French literature are prominent in these two volumes, they are at the same time truly international in character. Case law is adequately represented, and there are long verbatim extracts from documents. Professor Sibert's treatise is a distinct contribution to the science of international law and it helps to bring to mind the great part which French scholars continue to play in its development. One could only wish that the printing and the paper on which the treatise has been produced were more worthily expressive of its value.

H. L.

L'Individuo nel Diritto Internazionale. By GIUSEPPE SPERDUTI. Extract from *Studi Economico-Giuridici*, vol. xxiii (1949-50), published by the Faculty of Law of the University of Cagliari. Milan: Dott. A. Giuffrè. 1950. 202 pp.

The author, who is a strong advocate of the dualist theory, has set himself the task of examining the present position of the individual in international law. In order to justify his own fundamental approach he devotes an introductory chapter to a new attempt to provide a theoretical basis for the dualist view. This he finds in a difference in the concept and function of effectiveness in international and in domestic law. It may be doubted whether this doctrine is more fruitful than its predecessors. In the second place the author adduces an argument which is attractive at first sight, but which upon examination fails to convince. He points out that, in the view of international law, domestic law is a pure fact, and he can quote the authority of the Permanent Court of International Justice. But even in the eyes of local domestic law, foreign law is treated as a fact without, however, losing thereby its character of law. The main part of the book deals with the position of the individual outside the sphere of domestic law. Here the author deals with the right to petition an international organization and finds that, by treaty, individuals may be granted these and other rights. He discusses the position of the individual as an agent of international law (e.g. as an international official) and holds that as such he is merely an addressee, but not a subject of international law. He examines the place of the individual in courts such as the Mixed Arbitral Tribunals, but his argument is somewhat marred by a failure to notice that even truly international courts may have to apply private law. He then turns to the Law of State Responsibility as relating to acts done by or to individuals and concludes by taking the intermediate position that the individual is neither an object nor a subject of international law. In the view of the author he is a 'material subject' who has a legitimate interest, but no subjective right. The last part of the book is taken up by a very fully documented critical study of the present views on international criminal law and on the War Crimes Tribunals. In the author's opinion these were primarily domestic courts.

Those who accept the premisses of the author will find themselves in agreement with his conclusions. Adherents of the monist doctrine will find in this book much stimulating thought and a useful collection of material to re-examine their position. The author himself would probably regard the theoretical results of his researches as the central part of his work. In the opinion of the reviewer, its main value lies in his acute analytical discussion of his material.

K. LIPSTEIN

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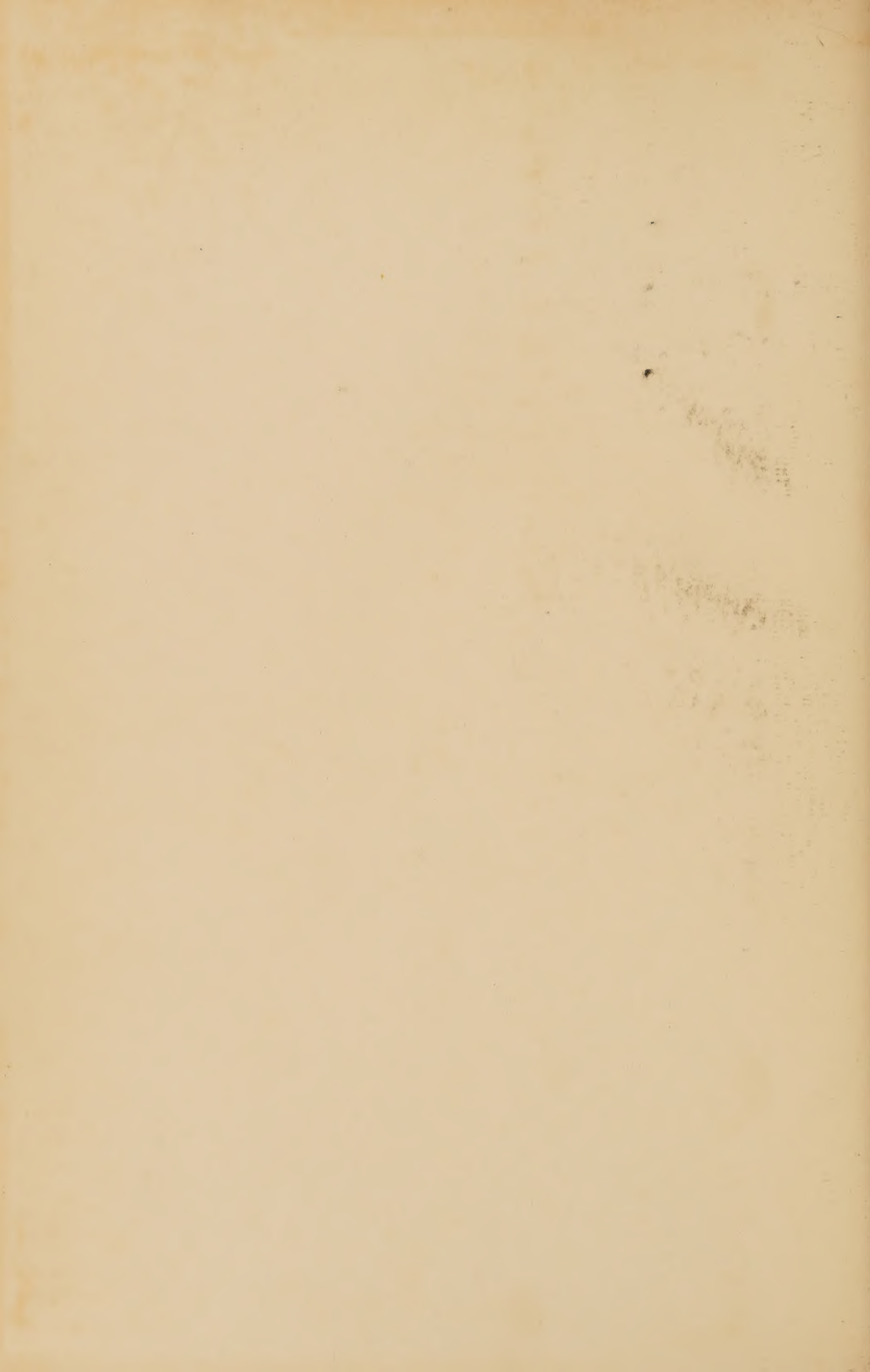
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